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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

## No. 72-152

**WILLIAM R. MING, JR.,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner, William R. Ming, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 26, 1972.

## OPINION BELOW.

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The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. No written opinion was rendered by the District Court for the Northern District of Illinois.

## JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 26, 1972. A timely petition for rehearing was denied on June 26, 1972. See Appendix B hereto. This petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

**U.S.C.A. Const. Amend. V**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

**U.S.C.A. Const. Amend. VI**

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

**26 U.S.C.A. §7203**

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

**26 U.S.C.A. §7206**

"Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return,

affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

• • •

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

**28 U.S.C.A. §144**

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

## QUESTIONS PRESENTED.

1. What is the proper interpretation of "willfully" in 26 U.S.C.A. §7203 in a prosecution for failure to timely file personal income tax returns?

2. May a conviction for violation of 26 U.S.C.A. §7203 stand where to secure the conviction the prosecution relied on a false and misleading document purportedly certified to as true by an Internal Revenue Service District Director?

3. Was the petitioner denied a trial by an impartial jury in violation of the Fifth and Sixth Amendments to the Constitution of the United States?

4. Was the petitioner denied due process in violation of the Fifth Amendment to tne Constitution of the United States?

5. Should not the motion of petitioner pursuant to 28 U.S.C.A. §144 for substitution for the district judge have been granted?

## STATEMENT OF THE CASE.

Petitioner was charged on April 14, 1970, in a four-count information with having willfully and knowingly failed to file income tax returns for the years 1963 through 1966 by April 15 of each of the succeeding years in violation of 26 U.S.C.A. §7203 (R. 2).[1]

The returns for all four years were in fact filed by petitioner and the taxes shown to be due paid in full before criminal prosecution was begun or intimated (Tr. 264, 306, 566). The returns for the years 1964 to 1966, inclusive, admittedly were received by the Internal Revenue Service, sometimes hereinafter referred to as IRS, two and a half years before criminal charges were brought (Tr. 146-148). At the suggestion of IRS agents the returns for 1963 were not delivered to them for some months later though they had been earlier prepared by petitioner's accountants (Tr.

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[1] The record below consists of an "Original Record on Appeal" (R. ——), and the court reporter's transcript (Tr. ——). In the Original Record on Appeal, each item is numbered separately and the numbers are consecutive in relationship to the date of filing or entry. Where the document consists of more than one page, however, the individual pages are not numbered consecutively save as to the individual document. The reporter's transcript is numbered consecutively. Though two different numbers appear on some pages of the transcript, reference herein will be to the number at the extreme right because those numbers run consecutively throughout the whole of the transcript. References to particular pages of any document included in the Original Record on Appeal consisting of more than one page will be made by reference to the number given the document and the count of any particular page after the first, *e.g.*, R. 40(2) refers to the second or signature page of the Motion of Defendant William R. Ming, Jr., pursuant to Title 28, U.S.C.A. §144.

667). The criminal proceeding charged nothing but late filing and raised no questions about Ming's tax returns or payments for 1967, 1968 or 1969 (R. 2).

Petitioner was convicted on each of the four counts, after a jury trial, and sentenced by the Honorable Julius J. Hoffman, district judge presiding, to serve four months in prison, to pay a fine of $1,250 on each count, and to pay the costs of prosecution. The sentences were made to run consecutively, so that the penalty imposed on petitioner for filing tax returns late total sixteen (16) months in prison, a fine of $5,000, and the costs of prosecution (R. 51, 52, 58).[2]

On the trial the prosecution showed, without objection, that petitioner knew he was a person required by law or regulation to make a return for each of the four years in question on or before the respective due dates (Tr. 585-586). In addition, also without objection, an IRS clerk, Rose Chowanek, testified that a search of IRS records by her in 1968 failed to disclose timely filing of returns for the years 1963 to 1966, both inclusive (Tr. 225-227). Over strenuous objection by petitioner, and for the alleged purpose of establishing a pattern of conduct bearing upon the question of willfulness on the part of petitioner, the prosecution was allowed to introduce testimony by her that a search of IRS records six days before the trial failed to disclose *timely* filing of returns by petitioner in the years 1956 through 1962 (Tr. 229-236, 240-248). In addition, also over strenuous defense objection, the prosecution was al-

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[2] Though no motion for probation was in fact made, the district judge, on his own motion, treated the statements of defense counsel made at the time of the sentencing, but prior thereto, as a motion for probation and denied it (R. 58).

lowed to introduce in evidence as Government Exhibit No. 1 an IRS Form 899, which is a certificate dated January 26, 1968 by the IRS District Director that *no* returns had been filed by petitioner and his wife and *no* taxes paid by them for the years 1956 through 1966 (Tr. 249-251). A copy of that exhibit is attached hereto as Appendix C.

This certificate was the result of a request by IRS Special Agent Vallee made on or about November 30, 1967 (Tr. 296-299, 319-320).

In fact, and it was admitted by both the IRS employees and the prosecution, on the day the request for the search was made petitioner's returns for the years 1964, 1965, and 1966 had been in the hands of the IRS for nearly two months (Tr. 146-149, 296-299). Indeed, those returns had been delivered directly to Special Agent Vallee, who made the request for the search, by the acccountant who prepared them (Tr. 146-148, 297-301). Petitioner's returns for 1962 and 1963 were also delivered to Special Agent Vallee by counsel for the petitioner but not until August, 1968 (Tr. 302-303, 433). Amazingly, witness Chowanek testified that she was responsible for the preparation of Government Exhibit No. 1 and that her search of the IRS records with respect to the years covered by the information was made between July and October, 1968 (Tr. 243, 248), at least six months after the certification date on Government Exhibit No. 1. A copy of the transcript of her testimony is attached hereto as Appendix D.

Petitioner testified without contradiction that all of petitioner's tax records for 1961 and prior years had been delivered to an accountant, who, prior to his death in May, 1967, had a power of attorney from petitioner and his wife (Tr. 556). Petitioner, however, was not permitted to show

that these records could not be located by either IRS or petitioner (Tr. 371, 372, 424-427, 557). On objections by the prosecution, the district court refused to admit in evidence the tax returns filed by petitioner for the years in question (Tr. 315-318); petitioner's cancelled checks showing payment of the taxes due *before* the criminal charges were initiated (Tr. 566-574); documentary evidence of the tremendous professional workload of petitioner in the period in question (Tr. 539-543); evidence of the efforts of petitioner through the deceased accountant to cause returns to be prepared and filed (Tr. 555-557); testimony and work papers of the accountants who did in fact prepare the returns showing the extent and care with which petitioner had caused records of his financial transactions to be kept and the complexity of preparing the returns themselves (Tr. 383-385, 686); and the testimony of Dr. Lawrence Freedman, an eminent forensic psychiatrist and long-time friend and associate of petitioner, with respect to the professional and other activities of petitioner during the period in question, petitioner's lack of materialistic concern, and his greater preoccupation with people and with causes than with money (Tr. 620-642).

Prior to the trial, a motion by petitioner to dismiss the information because of its form, and to suppress evidence because of the lack of showing of warnings to petitioner before he was interrogated was denied for the stated reason that petitioner is a lawyer (R. 9, 14).

A motion on October 19, 1970, to delay the trial until after the election of November 3, 1970, because of the pretrial publicity concerning petitioner and his representation of the Chicago Board of Election Commissioners in litigation with the Department of Justice concerning that elec-

tion was denied (R. 34, 36), even though immediately prior to the making of the motion the voting record of petitioner in the Chicago Board of Election Commissioners had been subpoenaed by the United States in the instant case (R. 37).[3]

On October 26, 1970, petitioner filed a petition under 28 U.S.C.A. §144 charging that the district judge was biased in favor of the government, based on prior statements of the district judge as to the impropriety of attacks on the credibility of government agents and the refusal of the district judge to delay the trial in this case for a few days till after the election, and in light of the order of the Court of Appeals of the Seventh Circuit that petitioner should be prepared immediately to provide a memorandum of law in answer to a government memorandum in *United States* v. *Kusper*, the litigation then pending concerning the election, and that petitioner should be prepared to present oral argument in the court of appeals on that matter on the day after the instant case was due to start to trial (R. 40). A copy of that §144 petition with the supporting affidavit and certificate of counsel is attached hereto as Appendix E. That petition was denied (R. 41).

The trial began on October 26, 1970, and ended on November 2, 1970. Over the objection of petitioner, he was limited to three peremptory challenges in the selection of the jury (Tr. 2-4), though as the court of appeals later pointed out, the maximum sentence if petitioner was found guilty on each of the counts could have been four years

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[3] Over the objection of the defense, the prosecution was permitted to ask the petitioner on cross examination if he had voted in the Democratic primary in 1964! (Tr. 600-601)

imprisonment and is, in fact, sixteen months imprisonment. Similarly, the district court denied a motion for mistrial when the prosecution exercised its peremptory challenges only to eliminate Negroes from the jury, though petitioner is himself a Negro (R. 43 (1 & 2), & 44).

In the main, in addition to the testimony of petitioner, the court admitted in evidence on behalf of the defendant only the testimony of a distinguished list of character witnesses who testified to the excellent reputation of petitioner for truth and veracity (Tr. 326, 405, 434, 439, 442, 448, 462, 467, 615). Included among these character witnesses were Mahalia Jackson, gospel singer, now deceased; Edward Levi, President of the University of Chicago; Ramsey Clark, former Attorney General of the United States; Monsignor John Egan a clergyman associated with the University of Notre Dame; Roy Wilkins, Executive Director of the National Association for the Advancement of Colored People; Martin Luther King, Sr., minister of the Ebenezer Baptist Church, Atlanta, Georgia; R. Jess Brown, educator and Mississippi lawyer; Dominic A. Tesauro, Chicago lawyer and former Regional Administrator of General Services Administration, and Dr. Stanley Korff, Chicago dentist. The district judge, however, admonished the jury that "evidence of good reputation should not constitute an excuse to acquit the defendant . . ." (Tr. 774).

On appeal the Court of Appeals for the Seventh Circuit affirmed on the basis that no more was required to demonstrate that petitioner had "willfully" failed to make timely returns than that he had not made them on time though he knew such returns were due.

## REASONS FOR GRANTING THE WRIT.

### 1. THE COURT BELOW IMPROPERLY INTERPRETED 26 U.S.C.A. §7203.

The Internal Revenue Act in 26 U.S.C.A. §7203 makes it a misdemeanor punishable by a fine of not more than $10,000 or imprisonment of not more than one year, or both, together with the cost of prosecution, for any person "willfully" to fail to pay any estimated tax or tax, make a return, keep records, or supply information at the time or times required by law or regulations. In view of the millions of natural persons, to say nothing of business entities, who are required to make returns, pay taxes, keep records, etc., the importance of when the failure of any of them to comply literally with the statute or one of the myriad regulations is a crime is a matter of enormous importance not only to petitioner but to millions of other American citizens.

The courts below ruled that the prosecution could satisfy its obvious burden to prove beyond a reasonable doubt that petitioner had "willfully" failed to file returns at the time required simply by showing that he knew a return was due but did not file it. Moreover, the courts below admitted government "evidence" of earlier alleged failures of petitioner to file timely returns as bearing on whether petitioner failed to file "willfully."(4)

(4) We shall demonstrate, infra, that this "evidence" was both incompetent and, in large part, false and misleading as the prosecutor well knew. Even the court of appeals did not understand this "evidence." That court thought it only showed failure to file returns timely though Government Exhibit No. 1 is obviously not so limited.

In contrast, the district court refused to admit testimony and documentary evidence as to the detailed financial records covering all of the years involved which petitioner caused to be maintained; evidence of what petitioner was actually going when the returns were due: the complexity of the returns; and petitioner's efforts to get the returns prepared. Consistently with their unabashed view that there could be no defense to the criminal charge if the taxpayer knew a return was due and did not file it, the courts below also refused to hear the testimony of a psychiatrist as to his long, continued observations of the petitioner's activities and frame of mind. Indeed, it was with the greatest reluctance that the district judge permitted petitioner himself to deny in the presence of the jury that petitioner had any criminal intent (Tr. 583).

The interpretation of "willfully" in §7203 by the courts below is a judicial excision of the express Congressional mandate that criminal sanctions for violation of §7203 be limited to those persons who have a criminal intent when they fail to comply with the tax laws and regulations. This court has never tolerated that kind of judicial interpretation of federal criminal statutes. See *Morissette* v. *United States,* 342 U.S. 246, 72 S. Ct. 240 (1952); *Screws* v. *United States,* 325 U.S. 91, 65 S. Ct. 1031 (1945); and *Potter* v. *United States,* 155 U.S. 438, 15 S. Ct. 144 (1894).

Indeed, speaking of the provision of the Internal Revenue Act which became §7203, in *United States* v. *Murdock,* 290 U.S. 389, 394-395, 396 and 397-398, 54 S. Ct. 223, 225 and 226 (1933), this Court said:

> "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished

from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose . . . without justifiable excuse . . . stubbornly, obstinately, perversely. . . The word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act." (Citations omitted).

Continuing, this Court said:

"Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information."

Similarly, this Court observed:

". . . Here we are concerned with a statute which denounces a willful failure to do various things thought to be requisite to a proper administration of the income tax law, and the government in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

Later opinions of this Court frequently cited in connection with the interpretation of "willfully" in §7203 are

consistent with *Murdock*. Those are the opinions in *Spies* v. *United States*, 317 U.S. 492, 63 S. Ct. 364 (1943), and *Sansone* v. *United States*, 380 U.S. 343, 85 S. Ct. 1004 (1965). In both of those opinions *Murdock* is cited with approval. Significantly, both *Murdock* and *Spies* in this regard are heavily relied on in *Screws*.

We respectfully submit that the decision of the courts below is in direct conflict with the interpretation given "willfully" in §7203 by this Court in *Murdock*. Though the court below cited *Murdock*, *Spies* and *Sansone* it apparently misapprehended the rulings of this Court as to the proper interpretation of "willfully" in §7203. Petitioner contended there and urges here that the prosecution has the burden of showing beyond a reasonable doubt the same intent on the part of a defendant charged with a violation of §7203 as the prosecution would have to show in a case charging a violation of §7201.

This Court observed in *Sansone*, 380 U.S. 343, 351-352, 85 S. Ct. 1004, 1010 that:

> "As has been held by this Court, the elements of §7201 are willfulness; the existence of a tax deficiency, *Lawn* v. *United States*, 355 U.S. 339, 361, 78 S. Ct. 311, 323, 2 L. Ed. 2d 321; *Spies* v. *United States*, *supra*, 317 U.S. at 496, 63 S. Ct. at 366; and an affirmative act constituting an evasion or attempted evasion of the tax, *Spies* v. *United States*, *supra*. In comparison, § 7203 makes it a misdemeanor willfully to fail to perform a number of specified acts at the time required by law—the one here relevant being the failure to pay a tax when due. This misdemeanor requires only willfulness and the omission of the required act—here the payment of the tax when due. As recognized by this Court in *Spies* v. *United States*, *supra*, 317 U.S. at 499, 63 S. Ct. at

368, the difference between a mere willful failure to pay a tax (or perform other enumerated actions) when due under § 7203 and a willful attempt to evade or defeat taxes under § 7201 is that the latter felony involves "some willful commission in addition to the willful omissions that make up the list of misdemeanors." Where there is, in a §7201 prosecution, a disputed issue of fact as to the existence of the requisite affirmative commission in addition to the § 7203 omission, a defendant would, of course, be entitled to a lesser-included offense charge based on § 7203. Cf. *Spies* v. *United States, supra.* In this case, however, it is undisputed that petitioner filed a tax return and that the petitioner's filing of a false tax return constituted a sufficient affirmative commission to satisfy that requirement of § 7201. The only issue at trial was whether petitioner's act was willful. Given this affirmative commission and the conceded tax deficiency, if petitioner's act was willful, that is, if the jury believed, as it obviously did, that he knew that the capital gain on the sale of the property was reportable in 1957, he was guilty of violating both §§ 7201 and 7203. If his act was not willful, he was not guilty of violating either § 7201 or § 7203. Thus on the facts of this case, §§ 7201 and 7203 "covered precisely the same ground." *Berra* v. *United States, supra,* 351 U.S. at 134, 76 S. Ct. at 688. This being so, on the authorities cited, it is clear that petitioner was not entitled to a lesser-included offense charge based on § 7203."

Thus, in a prosecution under § 7203 the prosecution must prove beyond a reasonable doubt, in the language of this Court in *Murdock,* that petitioner's conduct was "prompted by bad faith and evil intent." This, we submit, the prosecution did not do and the courts below improperly refused to apply the plain requirements of §7203.

As the court below was advised, its interpretation and that of the district court of §7203 is in conflict with the decisions interpreting §7203 in other circuits. See *United States* v. *Vitiello,* 363 F. 2d 240 (3d C.A. 1966), and *Haner* v. *United States,* 315 F. 2d 792 (5th C.A. 1963). Indeed, it may be that the decision of the court below is in conflict with decisions of the Ninth Circuit as well. See *United States* v. *Fahey,* 411 F. 2d 1213 (9th C.A. 1969). While it is true that in the *Fahey* case the court refused to rule that the requirement of willfulness in § 7203 involved an intent to defraud, the court did not go as far as did the court below in the instant case.

Actually, there is no reported case in which "willfully" in § 7203 has been so sterilized as it was by the court below. See Orlando, 74 Dickinson Law Review 563, "*Willfully" Under §7203 of the Internal Revenue Code of 1954,* (1970), for a general exposition and catalogue of the decisions interpreting that term.

The conflict in the circuits and the decision below may be the result of the fact that it does not appear that this Court has decided a case solely on the basis of its interpretation of the term "willfully" in § 7203. The interpretations in *Murdock, Spies,* and *Sansone,* strictly speaking, all appear to be *dicta.* In *Murdock,* the *decision* of this Court as distinguished from its *dicta,* was that the peremptory instruction of the district judge as to his belief in the guilt of the defendant, was an improper instruction. Continuing, in order to distinguish a prior decision of this Court with respect to a judicial statement of opinion upon "undisputed and admitted facts," this Court pointed out that *Murdock* was not such a case "unless the word 'willfully,' used in the sections upon which the indictment was founded, means no more than voluntarily."

290 U.S. at 394, 54 S. Ct. at 225. This Court, of course concluded that "willfully" meant a great deal more. The decisions of the courts below in the instant case are to the contrary.

*Spies* was a case in which the petitioner was charged with the felony of "willfully attempting to defeat and evade the tax, and recited willful failure to file a return and willful failure to pay the tax as a means to the felonious end." The prosecution contended that by proving two misdemeanors it satisfied its burden to prove the felony beyond a reasonable doubt. This Court refused to approve that extreme construction of the felony statute, reversed the conviction and ordered the matter submitted to a jury with a proper instruction.

Similarly, *Sansone* was a case where the taxpayer was prosecuted for the felony of willfully and knowingly attempting to evade and defeat federal income tax by omitting to report a long-term capital gain in violation of §7201 of the Internal Revenue Code. This Court ruled that he was not entitled to an instruction on the lesser included offense charge of the misdemeanor under §7203 because, as we have shown, the willfulness element of the two offenses in that case were the same.

The decision of the court below may also be in conflict with Judge Friendly's interpretation of "willfully" in §7203, *United States* v. *Platt*, 435 F. 2d 789 (2d C.A. 1970). In any event, that opinion itself is illustrative of the confusion resulting from the unsettled meaning of "willfully" in §7203. Perhaps more important, however, Judge Friendly makes an observation which demonstrates the inevitable bureaucratic discretion that flows from an

interpretation of "willfully" such as that of the courts below. He said, in part, 435 F. 2d at 794:

> "A taxpayer going on a spring holiday who knows he has not filed the return that will become due on April 15 but intends to and does file it in early May, would not be a likely candidate for prosecution under § 7203 even though the elements of the offense exist; the Commissioner would almost certainly be content with the 5% penalty imposed by § 6651 unless the incident was part of a regular pattern of disobedience."

The number of late returns does not appear to be readily available since there is no specification in the most recent annual report of the Commissioner of Internal Revenue with respect to the matter. It does appear, however, that for the fiscal year ending June 30, 1970, there were less than a thousand criminal prosecutions for all federal tax offenses. Absent the safeguard of a rigorous enforcement of the requirement of §7203 that the prosecution show a criminal intent beyond a reasonable doubt, who is prosecuted inevitably will depend upon the bureaucratic and prosecutorial discretion. We respectfully submit that due process of law can not be satisfied under those conditions.

In this connection, we submit that a useful analogy may be found in the "freedom of speech" cases where this Court only recently reaffirmed its position that conviction of a violation of a statute or ordinance whose standards depended upon the sensitivity of unidentified persons do not satisfy due process. See *Coates* v. *Cincinnati,* 402 U.S. 611, 613-614, 91 S. Ct. 1686, 1688 (1971), and *Cohen* v. *California,* 403 U.S. 15, 91 S. Ct. 1780, 1785-1786 (1971).

We respectfully submit that to the extent that this Court has expressed its views on the proper interpretation of "willfully" in §7203, the court below acted inconsistently with the views of this Court. In addition, the decision of the court below is in conflict with the decisions of other courts of appeal. Both the decision below and the conflicts as to this important question of federal law would appear, we respectfully submit, to require settlement by decision of this Court and exercise of its supervisory authority.

Accordingly, we urge this Court to grant the writ of certiorari so that the question of the proper interpretation of "willfully" in §7203 may be thoroughly and finally explored by this Court.

**2. THE PROSECUTION RELIED ON FALSE AND MISLEADING EVIDENCE TO SECURE THIS CONVICTION.**

The documentary evidence offered by the prosecution in this case consisted of petitioner's draw checks for the years in question, a stipulation that they were in fact paid to him, and Government Exhibit No. 1 (Tr. 83-84, 95-100, 249-251). That exhibit attached hereto as Appendix C, is dated January 26, 1968. It bears what appears to be a facsimile of the signature of one E. C. Coyle, Jr., District Director of the Internal Revenue Service for Chicago, Illinois on that date. It recites:

> "I (the district director) certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, payments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as to the date of this certification are shown therein."

Government Exhibit No. 1 was offered in evidence by the prosecution on the third day of the trial *after* all of its other documentary evidence had been marked and admitted (Tr. 249-251).

The only foundation provided by the prosecution for Government Exhibit No. 1 was the testimony of Rose Chowanek (Tr. 223-229, 240-265). A copy of that testimony in *haec verba* is attached hereto marked Appendix D. It is obvious from her testimony that she was responsible for preparing Government Exhibit No. 1 and that whatever investigation she made, if any, was limited to a search of index cards which she alleged showed only returns timely filed (Tr. 224-225, 248-249).[5]

The district court ruled that Government Exhibit No. 1 "merely corroborates her (Rose Chowanek's) oral testimony" (Tr. 272).

We respectfully submit that the only way in which Government Exhibit No. 1 can be read is that it says that the petitioner and his wife neither made any income tax returns nor paid any income tax between May 8, 1956, and the date it bore, i.e., January 26, 1968. The IRS knew that this statement was false if for no other reason than that on October 11, 1967, IRS Special Agent Vallee had been handed petitioner's returns for the years 1964, 1965 and 1966 (Tr. 146-148, 297-301).

Another government witness, Special Agent Wassenaar, testified that on November 20, 1967, he knew petitioner's returns for 1964, 1965 and 1966 had been filed (Tr. 218).

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[5] It should be observed that the only entry on Government Exhibit No. 1 as to a filing of tax returns and payment of taxes by petitioner and his wife is not a *timely* filing.

When petitioner sought to introduce the testimony of the accountant, Pittman, concerning the returns filed for petitioner and his wife for the years 1962 to 1966, both inclusive, the district judge sustained the government's objection to the testimony (Tr. 381). In fact, as the offer of proof shows, in addition to the returns filed in August of 1967 by Pittman, he prepared returns for 1962 and 1963, but withheld filing of them at the suggestion of Treasury Agent Vallee until October, 1968 (Tr. 667-668).

Thus, in October 1968, when witness Chowanek testified her search of the limited file cards was made at the request of Treasury Agent Vallee, and on the basis of which she testified Government Exhibit No. 1 was prepared, though it bears a date nine months earlier, the Chicago District Office of IRS had in its possession income tax returns for petitioner and his wife for the years 1962 to 1966, both inclusive. In addition, the returns for 1964, 1965 and 1966 had already been audited by the Internal Revenue agents (Tr. 342-348, 354-357, 363-366).

Ultimately, though not when it was offered, the prosecution sought to justify the introduction of Government Exhibit No. 1 on the ground that this exhibit was admissible to show a pattern of conduct by petitioner and therefore was relevant to the question as to whether he "willfully" failed to make timely filings in the years covered by the information (Tr. 271). The district judge sustained that position of the prosecution (Tr. 271-272) and specially so instructed the jury (Tr. 775-776). But in a colloquy between court and counsel, the prosecutor flatly stated that the petitioner had not filed returns or paid taxes between 1956 and 1961 (Tr. 285). The only basis he offered for that astounding statement was Government Exhibit No. 1.

Certainly, as of the date when Government Exhibit No. 1 was introduced in evidence, the prosecution knew that it was a false certificate. Indeed, the prosecutor admitted that in so many words when he said:

> ". . . there is absolutely no dispute that these returns were filed, that they were filed late, and the Government put that into its case in chief. However, the admission of these documents into evidence is completely not relevant to the issues in this case, and additionally, I can see no benefit at all for this jury to have before it income tax returns that are filed late and which the witnesses have testified to, that have been filed late and when they were filed, to have on the side, under itemized deductions, Mr. Ming's contributions to churches, to building funds, to councils, things that are totally outside of the scope of this trial. There is no question that they were filed, but what relevance do they have to the issues of this case? They were not timely filed. And that is why we object to their introduction, that they are not probative." (Tr. 306).

The prosecution also knew that no witness and no documentary evidence had been offered to support the certificate of the district director on Government Exhibit No. 1. Thus the prosecution knew that the certificate was false. In addition, the prosecution knew that Government Exhibit No. 1 was incompetent since the prosecution's own evidence showed that there was no proper foundation laid for it.

The District Director whose certificate this purported to be was not presented for cross examination. Witness Chowanek obviously examined only her limited index

cards so that cross examination of her as to the full negative thrust of Government Exhibit No. 1 would have been meaningless. Government Exhibit No. 1 could not be cross examined. Neither could the prosecutor. Thus petitioner was effectively deprived of all of the customary safeguards.

It was Government Exhibit No. 1, and only Government Exhibit No. 1, that the district judge permitted the jury to take to the jury room, over the objections of defense counsel (Tr. 791-792). He refused to admit in evidence, so that they could *not* be taken to the jury room, the income tax returns filed by petitioner for the years 1962 to 1966, both inclusive, which bore the "Received" stamp of the Internal Revenue Service and petitioner's cancelled checks in payment of the taxes (Tr. 315-318, 566-574).

Government Exhibit No. 1 is "manufactured" evidence. Not only is it "manufactured" but it was "manufactured" solely for the purpose of this prosecution. At best Government Exhibit No. 1 is ambiguous and misleading. In fact, however, it is false.[*] When the exhibit is coupled with the exclusion of the evidence tendered by the defense, the prejudicial effect of Government Exhibit No. 1 is overwhelming. It is devastating when to that is added the peremptory instruction that:

> "I charge you that the only bad purpose necessary for the government to prove in this case is the deliberate intention not to file returns which the defendant knew he was required to file at the time he was required to file them." (Tr. 767).

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[*] In this reegard the Court's attention is directed to 26 U.S.C.A. §7206 set forth *supra*, P. 3.

There does not appear to have been a decision by this Court concerning the responsibility of United States Attorneys for the evidence which they sponsor. It cannot be conceived, however, that the federal judicial system would tolerate a lower standard of conduct for federal prosecutors than it imposes on prosecutors in the several states. This Court pointed out in *Miller* v. *Pate*, 386 U.S. 1, 7, 87 S. Ct. 785, 788 (1967) that:

> "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney* v. *Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791. There has been no deviation from that established principle. *Napue* v. *People of State of Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217; *Pyle* v. *State of Kansas*, 317 U.S. 213, 63 S. Ct. 177, 87 L. Ed. 214; cf. *Alcorta* v. *State of Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9. There can be no retreat from that principle here."

In the trial in this cause the prosecution violated that fundamental rule.

The prejudicial effect of Government Exhibit No. 1 is obvious. The need for it in the view of the prosecution requires the conclusion that without it, no matter how the term "willfully" in §7203 was interpreted, it did not appear likely that the jury would convict the petitioner. No other explanation appears for this reckless disregard of the fundamental rights of the petitioner to a fair trial, no matter what his offense, and no matter what his profession or business, political activities, or race.

We respectfully urge upon this Court that the prosecution, district judge, and the court of appeals have all so far departed from the accepted and usual course of

judicial proceedings in this regard as to call for an exercise of this Court's power of supervision by granting the writ of certiorari prayed for and reversing the conviction.

**3. PETITIONER WAS DENIED A TRIAL BY AN IMPARTIAL JURY.**

Conflicts between the circuits with respect to the proper interpretation of "willfully" in 26 U.S.C.A. §7203 notwithstanding, it has never been questioned but that if put in issue by a plea of not guilty and if the jury were not waived, the question as to whether the conduct of the taxpayer complained of violated the statutory prohibition was a question for a jury. (See *United States* v. *Platt, supra.*) Equally, it has never been questioned but that if the instant case, like any other criminal case, involved a jury question, that question would have to be resolved by a fair and impartial jury in light of the fundamental requirements of the Sixth Amendment to the Constitution of the United States.

As the result of a series of objections, rulings and instructions, however, in the instant case the petitioner was denied a trial before an impartial jury. This, we submit, was so far a departure from the customary and usual course of judicial procedure that when it has been sanctioned by the court below the exercise of the supervisory authority of this Court is required.

To begin with, the question arose as to the number of peremptory challenges to which prosecution and defense would be entitled. Rule 24(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

> "If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If

> the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly."

On October 19, 1970, the district judge, responding to an inquiry by defense counsel said the prosecution would be entitled to six peremptory challenges and the defendant to ten (Tr. 34) and indicated that he had so ruled in all other like cases. A week later on the first day of the trial without any citation of authority, and there appears to be none, and with no justification offered by the prosecution for its position, the district judge adopted that position which was to limit prosecution and defense to three peremptory challenges (Tr. 2-4). This, despite the fact that the same district judge sentenced the petitioner to serve sixteen months in the penitentiary and on the district judge's own motion treated arguments on the sentence by defense counsel as a motion for probation and denied it. Needless to say, petitioner exercised all three of his peremptory challenges (Tr. 63 and 66).

The impact and import of the rule leaves no room for argument. Obviously, the use of peremptory challenges is a traditional method of assisting both prosecution and defense in securing an impartial jury. The differential in the number of peremptory challenges provided by the rules manifest the concern of the federal courts in this regard. The ignoring of the rule in the instant case inevitably contributed to the denial to petitioner of an impartial jury.

It is equally clear and well settled that the exclusion of persons from jury service solely on account of their color is a denial of constitutional guarantee of an impartial jury, *Peters* v. *Kiff*, ..... U.S. ....., ..... S. Ct. ....., 40 L.W. 4819 (1972). It is equally clear that the constitutional requirements weigh as heavily on prosecutors as they do upon judges. (See *Miller* v. *Pate, supra.*) In the instant case, the prosecutor used peremptory challenges solely for the purpose of excluding the only two Negroes tendered for the jury (Tr. 62, 65). The prosecutor did not use his third peremptory challenge and at no point in this record has the government ever denied that it was the intention of the prosecution to exclude Negroes from the jury in this case.

Finally, as we have already demonstrated, we submit, the interpretation placed on the term "willfully" in §7203 by the district judge, his rulings on the admissibility of evidence, including Government Exhibit No. 1, and his peremptory and improper instructions to the jury, deprived the twelve persons who did indeed serve on the jury of any opportunity, even if they had been so minded, of providing the impartial verdict which the Constitution and Laws of the United States require for each defendant.

Under these circumstances, we respectfully submit, affirmance by the court below of the conviction in the face of these matters which were brought to the attention of the court below, amounts to a sanction of a departure from the customary and usual course of judicial procedure so radical as to require the exercise of the supervisory authority of this Court.

For these reasons, as for the others already stated, we respectfully urge the Court to grant this petition for certiorari.

**4. PETITIONER WAS DENIED DUE PROCESS.**

The record in this case demonstrates that the conviction of the petitioner resulted from a general denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

To begin with, no pretense was ever made that the Internal Revenue agents who interrogated petitioner on several occasions, beginning November 20, 1967, and who freely examined all of his books, records, papers, documents, etc., as well as those of the law firm in which he is a partner, ever gave any constitutional warnings to petitioner or prior to December 27, 1968, intimated that any criminal prosecution was contemplated. This, despite the plain provisions of the "Instructions to all Special Agents of the Intelligence Division" which are reported in *United States* v. *Heffner,* 420 F. 2d 809, 811 (4th C.A. 1969) to have been as follows as of October 3, 1967:

> "In response to a number of inquiries, the Internal Revenue Service today described its procedure for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.
>
> "Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.
>
> "Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.

"On initial contact with a taxpayer, IRS Special Agents are *instructed* to produce their credentials and state: '*As a special agent, I have the function of investigating the possibility of criminal tax fraud.*'

"If the potential criminal aspects of the matter are not resolved by preliminary inquries and further investigation becomes necessary, the Special Agent is *required* to advise the taxpayer of his Constitutional rights to remain silent and to *retain counsel.*

• • • • •

"IRS said although many Special Agents had in the past advised *persons, not in custody,* of their privilege to remain silent and retain counsel, the recently adopted procedures *insure uniformity in protecting the Constitutional rights of all persons.* (emphasis supplied.)"

When this matter was brought to the attention of the district judge by a motion to suppress evidence (R. 9), he denied the motion on the ground petitioner was a lawyer. We respectfully submit that this did not warrant the IRS in violating its own rules. See *Heffner, supra,* and *United States* v. *Leahy,* 434 F. 2d 7 (1st C.A. 1970). Perhaps more important, the fact that petitioner was a lawyer, and no notice was given, lulled him into a false sense of security with respect to the intentions of the government.

We have already alluded to the problems of the jury selection, and we shall separately discuss the matter of the denial of petitioner's motion pursuant to 28 U.S.C. §144, *infra.* It must be observed, however, that denial of the motion by petitioner to hold the trial in this cause after the election scheduled for November 3, 1970, in light of the pre-trial publicity concerning the litigation be-

tween the Department of Justice and the Chicago Board of Election Commissioners raises serious questions as to both the bias of the district judge and the possibility of fair trial for petitioner. See *Sheppard* v. *Maxwell*, 384 U.S. 333, 86 S. Ct. 1507 (1966).

As distinguished from procedural errors, of which there were many, essentially the trial in this cause was conducted in a way which dictated the conviction of the petitioner. That this is true is amply demonstrated by the fact that the district judge, over the objection of defense counsel, admitted in evidence as relevant to the question as to whether the petitioner failed to file timely returns "willfully" alleged evidence of previous failure to file timely returns (Tr. 229-236, 240-248). This, even though both the government form used and the testimony of the government clerk were at best misleading and ambiguous and actually were false.

When, however, petitioner sought to introduce evidence of his past conduct to negate the charge that his failure to file returns on time was an omission "willfully" accomplished, the district judge refused to permit the admission of such testimony or documentary evidence to the same effect (Tr. 264, 306, 566). Indeed, the district judge, though he permitted testimony that the returns in question had been filed, refused to allow the jury to see the documents themselves on specious grounds.

Other evidentiary rulings were to like effect, including, but not limited to, interpretation of the term "willfully" in §7203; refusal to admit in evidence the testimony concerning the nature, detail, and accuracy of the financial records maintained by petitioner throughout the periods in question; and the belittling of the distinguished Amer-

cans who testified as character witnesses for petitioner. (See, e.g., the comment of the district judge with respect to the Rev. Martin Luther King, Sr., that "(i)t was one thing he didn't look and that was under nournished." Tr. 678).

To the same end, namely, assurance of the conviction of the petitioner, the district judge gave instructions to the jury, peremptory in character, and surprisingly, negative in tone in that he specifically, and inappropriately, told the jury what the government need not prove.

An entire catalogue of the withering comments of the district judge with respect to defense counsel, defense witnesses, and defense arguments, would produce a petition beyond reasonable limits. Unfortunately, current legal record keeping devices do not admit a demonstration of judicial voice tones, gestures, and facial expressions.

The partisan political implications and comments of the prosecution permitted and indeed encouraged by the district judge are equally indicative that petitioner was denied a fair trial. It is difficult to conceive of any theory on which to justify allowance of the prosecution's question of the petitioner himself as to whether he had voted in a Democratic primary in 1964 (Tr. 600-601). This, on the eve of a hotly contested general election in November, 1970.

In this connection we respectfully request this Court to take judicial notice that on September 17, 1971, without notice to petitioner or hearing, four members of the five member Executive Committee of the District Court for the Northern District of Illinois, including the district court judge in the instant case, entered an order suspending the

petitioner from the practice of law in that court pending further order of the executive committee. On the same day, in a disciplinary proceeding involving another member of the bar of that court who had also been tried and convicted before the same district court judge who heard this case, he recused himself as a member of the executive committee and did not take part in the disciplinary proceedings. An appeal having been taken from that executive committee order suspending petitioner without notice or hearing, the order was stayed pending further order of the Court of Appeals.

We respectfully urge this Court to exercise its supervisory powers for the protection of petitioner.

**5. THE COURTS BELOW IMPROPERLY DENIED THE MOTION OF THE PETITIONER PURSUANT TO 28 U.S.C.A. §144.**

The petitioner presented a motion in the district court on October 26, 1970, prior to the beginning of the trial pursuant to 28 U.S.C.A. §144 with a supporting affidavit by petitioner and the requisite certificate of counsel charging bias in favor of the government on the part of the district judge.[7] A copy of that petition, affidavit, and certificate are attached hereto as Appendix E. No issue was raised by the prosecutor or the district judge as to the timeliness of the motion. The prosecution offered no answer or argument concerning the motion. Instead, the district judge summarily denied the motion on the ground that the affidavit was inadequate and did not meet the requirements of the statute (Tr. 3).

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[7] Plainly the motion was not interposed for purposes of delay. Counsel for petitioner emphatically stated that he was ready for trial that day (Tr. 2).

Long ago in *Berger* v. *United States*, 255 U.S. 22, 41 S. Ct. 230 (1921) this Court ruled that an affidavit in support of a motion pursuant to 28 U.S.C.A., §144 was sufficient if it stated facts which, if true, would show that the challenged judge has a bent of mind which might prevent a fair trial. In the instant case, the opinion of the court below to the contrary, the affidavit set forth facts from which the only inference to be drawn was that the district judge so acted in denying a motion for continuance as to threaten the effectiveness of the representation by petitioner of opponents of a major effort by the Department of Justice to assume control of the election in Chicago in November, 1970. In addition, the affidavit set forth facts from which the only inference to be drawn was that the district judge was so biased in favor of the government that he regarded it as improper and punishable to challenge the truth and veracity of the testimony of government agents. Obviously, as the record in this case discloses, the instant case as was alleged in the affidavit, involved the truth and veracity of government agents. There was no warrant for the decision of the district judge that the affidavit on its face was not sufficient.

The court below, perhaps inadvertently, misapprehended, or at least misspoke, concerning the nature of the state of the litigation in *United States* v. *Kusper* before it at the time of the motion for continuance in the instant case. Similarly, the court below misapprehended, or at least misspoke, concerning the thrust of the allegations as to the government agents. Actually, of course, in light of the *Berger* case that court had no right to inquire as to the truth of the allegations of the affidavit. Certainly when they did, however, the court below should have stated the facts accurately.

The court of appeals in this case did not follow its prior decisions concerning the standard to be applied to an affidavit in support of a motion to disqualify a judge pursuant to 28 U.S.C.A. §144. See *Peacock Records Inc.* v. *Checker Records Inc.*, 430 F. 2d 85, 88 (1970), where the court stated "For the purpose of a 28 U.S.C. §144 motion, the facts contained in the affidavit for disqualification are to be taken as true, (citing cases)." Neither did it follow the only applicable authority, *Berger* v. *United States, supra.*

There appears to be no judicial authority with respect to the application of 28 U.S.C.A. §144 where the ground for the petition or motion is bias in favor of the prosecution.

The statute itself does not distinguish cases in which the United States of America is a party. Indeed, constitutional requirements of due process might dictate a higher standard of restraint on judicial action with respect to §144 motions in criminal cases than would be the case in civil cases in order to assure the impartial judge which the Fifth Amendment plainly requires.

We respectfully submit that the affidavit filed showed a bias or prejudice in favor of the plaintiff United States of America on the part of the district judge and the failure to grant the motion to substitute for the trial judge conflicts with the decision of this Court and other like cases in the Court of Appeals for the Seventh Circuit.

Accordingly, we urge this Court to exercise its supervisory powers.

## CONCLUSION.

For all the reasons set forth we respectfully urge this Court to grant the petition for writ of certiorari in this cause and either to reverse summarily the decision of the court below or in the alternative to provide for the filing of briefs and the making of full arguments in support of petitioner's contentions.

Respectfully submitted,

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APPENDIX A

# In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1971 — JANUARY SESSION, 1972

No. 71-1083

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

WILLIAM R. MING, JR.,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-CR-213

JULIUS J. HOFFMAN,
*Judge.*

ARGUED FEBRUARY 15, 1972 — DECIDED MAY 26, 1972

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and KILEY, *Circuit Judge.*

HASTINGS, *Senior Circuit Judge.* Defendant William R. Ming, Jr., was charged in four counts of an information. filed April 14, 1970, with having willfully and knowingly failed to make his federal income tax returns for the years 1963, 1964, 1965 and 1966 to the District Director of Internal Revenue,[1] in violation of Title 26, U.S.C.A.

[1] Count I is typical of the four counts and reads:
"The UNITED STATES ATTORNEY charges:
"That during the calendar year 1963,
"WILLIAM R. MING, JR.,
defendant herein, who was a resident of the City of Chicago, State of Illinois, had and received a gross income of $17,908.81, that by

§ 7203, being Section 7203 of the Internal Revenue Code of 1954.[2]

Following the disposition of the pre-trial motions, this cause was submitted for trial to a jury in the federal district court[3] on October 26, 1970. The jury returned a verdict on November 2, 1970, finding the defendant guilty on each of the four counts as charged in the information. Judgment was entered on the verdict. Following the denial of defendant's post-trial motions in arrest of judgment and for a new trial, defendant was sentenced to serve four months imprisonment on each of the four counts of the information, the sentences to run consecutively, for a total of 16 months. Defendant was also fined in the sum of $1,250 on each of the four counts, for a total of $5,000, together with the costs of prosecution. Defendant appealed. We affirm.

The basic facts in this case are not in dispute. Defendant did not timely file his federal income tax returns

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[1] (Continued)

reason of such income he was required by law, after the close of the calendar year 1963 and on or before April 15, 1964, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to said Director of Internal Revenue, or to any other proper officer of the United States, in violation of Section 7203, Internal Revenue Code, Title 26, United States Code, Section 7203."

Count II alleges defendant received a gross income of $28,039.07 in 1964; Count III alleges $29,279.01 in 1965; and Count IV alleges $23,697.36 in 1966.

[2] Section 7203 reads:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof *to make a return* (other than a return required under authority of section 6015 or section 6016), keep any records, or suppy any information, who willfully fails to pay such estimated tax or tax, *make such return*, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution." August 16, 1954, c. 736, 68A Stat. 851. (Emphasis added.)

[3] Trial was had in the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Julius J. Hoffman, Judge, presiding.

for each of the four years, 1963 through 1966. Defendant did not make such returns when due, that is, on or before April 15 of the year succeeding the calendar tax year involved. Defendant was a person required by law or regulation to make a return for each of the four years in question, his adjusted gross income having exceeded $600 for each of those years. Defendant knew that he was required to make such returns on or before the respective due dates. For the purpose of establishing a pattern of conduct bearing upon the question of willfulness, over objection, the Government established that the defendant failed to timely make his federal income tax returns for the seven preceding tax years of 1956 through 1962.

Testimony introduced by defendant, including his own, was directed to the one issue of whether he had any criminal intent in failing to make his returns when due, *i.e.*, whether he willfully and knowingly failed to do so. We shall subsequently treat the several issues raised concerning such testimony, as well as that excluded by the trial court in its evidentiary rulings.

It should be further pointed out at this juncture that defendant was charged under Section 7203, a misdemeanor statute. He was not charged under Section 7201 with willfully attempting to evade or defeat his federal income tax, a felony statute.

## THE INFORMATION

Defendant contends the district court prejudicially erred in denying his motion in arrest of judgment. He argues that the information is fatally defective because it does not state that he failed to make said income tax return "at the time or times required by law or regulations," the language of the statute. He says that the words used in the information, "said income tax return," do not refer to "the breach of the duty to file at the time required by law." We regard this as an unrealistic reading of the information.

Count I in the information does allege that defendant "was required by law * * * on or before April 15, 1964,

to make an income tax return • • • [and that] he did wilfully and knowingly fail to make *said income tax return* • • •." (Emphasis added.) We are at a loss to understand how anyone reading the information could fail to understand that "said income tax return" required by law to be made on or before the specified due date could be other than a return to be made at the time required by law.

We are not persuaded by defendant's attack on this information. We find ourselves in agreement with the holding in *United States* v. *Cotter*, 1 Cir., 425 F.2d 450 (1970). In *Cotter*, in considering the language used in an indictment charging a violation of Section 7203 for failure to make a return as "required by law" following the close of the calendar year 1962, the court said: "The fair meaning of 'said income tax return' is the return due on April 15, 1963." At 452.

## MOTION FOR SUBSTITUTION OF JUDGES

On the morning of the trial, defendant filed a motion for substitution of judges pursuant to Title 28, U.S.C.A. § 144. Defendant moved that Judge Hoffman proceed no further because he had "a personal bias and prejudice in favor of plaintiffs, which personal bias and prejudice was not known to defendant until on or about October 23, 1970." The motion was accompanied by defendant's supporting affidavit and a certificate of good faith by his counsel. Disregarding the question of timeliness or lack of it, Judge Hoffman considered the motion on its merits and denied it on the ground that "[t]he motion supported by an affidavit is entirely inadequate and does not meet the requirements of the statute."

Section 144 dictates disqualification only when "the judge • • • has a personal bias or prejudice either against him [the movant] or in favor of any adverse party • • •." Our examination of the affidavit reveals in substance that defendant alleged that Judge Hoffman had a personal bias or prejudice in favor of the United States of America based on the following cited examples of his judicial conduct:

(1) Judge Hoffman refused to grant defendant a continuance in the instant case so that defendant could participate in the appeal of an election case involving the Board of Election Commissioners of the City of Chicago, entitled *United States of America* v. *Kusper, et al., then pending in this court*; and

(2) Judge Hoffman, on November 30, 1966, in defendant's presence, in the case of *United States* v. *White,* a narcotics case where a defendant had accused United States Treasury agents of perjury, had characterized the agents as "brave young Treasury agents."

We take judicial notice of the proceedings on appeal in this court in the *Kusper* case and find no substance there to support the charge of bias and prejudice on the part of Judge Hoffman in favor of the United States. The denial of a simple continuance hardly rises to the dignity of giving "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States,* 255 U.S. 22, 33-34 (1921). *See Rosen* v. *Sugarman,* 2 Cir., 357 F.2d 794, 797-798 (1966); *Tucker* v. *Kerner,* 7 Cir., 186 F.2d 79, 83-85 (1950). *Cf. Peacock Records, Inc.* v. *Checker Records, Inc.,* 7 Cir., 430 F.2d 85, 88 (1970), cert. denied, 401 U.S. 975 (1971).

To the credit of defendant, we note one of his concluding statements in his supporting affidavit: "Affiant has known Judge Julius J. Hoffman for many years and has a high regard for him and as a result of comments made by the judge on occasion, believes the high personal regard to be mutual."

It was the judge's duty to inquire into the *legal sufficiency* of the facts stated in the affidavit. A trial judge has as much obligation not to recuse himself when there is no occasion for him to do so as there is for him to do so when the converse prevails. *Rosen* v. *Sugarman,* at 797. We conclude that defendant's supporting affidavit to his motion for substitution of judges was inadequate and does not meet the requirements of Section 144. It was not error to deny the motion.

## VALIDITY OF SECTION 7203

Defendant contends that Section 7203 "contains vague language and myriad cross references to interrelated enactments and regulations and, as a consequence, is void because it does not meet the standard of clarity required of penal statutes by the Fifth Amendment to the Constitution."

He buttresses his contention by resorting to the well established principle "that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." *Baggett* v. *Bullitt*, 377 U.S. 360, at 367 (1964). No one disputes the vitality of this constitutional pronouncement made in holding invalid two state statutes requiring state employees to subscribe to "non-subversive" oaths as a prior condition for public employment. It simply has no application to our consideration of the validity of Section 7203, either on its face or as applied.

Defendant's argument is predicated on the assumption that the meaning of "willfully fails * * * to make such return" in Section 7203 is to be equated with the meaning of "willful" in Section 7201, the felony statute. However, by comparison, Section 7201 refers to one "who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof." The felony statute requires the affirmative act of evasion, while the misdemeanor is an omission of a duty to make a return. This distinction was clearly recognized by the Supreme Court in *Sansone* v. *United States*, 380 U.S. 343, 350-354 (1965); *Spies* v. *United States*, 317 U.S. 492, 497-500 (1943); and *United States* v. *Murdock*, 290 U.S. 389, 396 (1933). Following *Sansone* and *Spies* is *United States* v. *Schipani*, 2 Cir., 362 F.2d 825, 831 (1966), cert. denied, 385 U.S. 934; and *Sansone* is *United States* v. *Fahey*, 9 Cir., 411 F.2d 1213, 1214 (1969), cert. denied, 396 U.S. 957.

All of these cases were correlated and cited with approval by our court in *United States* v. *Matosky*, 7 Cir., 421 F.2d 410, 411-413 (1970), cert. denied, 398 U.S. 904. There the defendant was convicted of a charge of failure

to file timely income tax returns for the years 1962, 1963 and 1964, in violation of Section 7203, and the only issue for trial by the jury was that of willfulness. We noted there that defendant's argument "that the test of 'willfulness' is the same under § 7203, as it is under § 7201" had been rejected in *Sansone*.

We conclude that Section 7203 is constitutional on its face. In support of defendant's contention that the statute was unconstitutionally applied to himself, he argues that the trial court erred in excluding his proffered testimony of Dr. Lawrence Freedman, a psychiatrist. This witness was asked a series of hypothetical questions by which the defendant offered to prove that his failure to make his tax returns was at least partially caused by emotional pressures and a lack of mental capacity referred to as "anti-materialistic neurosis." Defendant makes no plea of insanity. Since we hold that the meaning of willfulness is as set out in the foregoing authorities, it necessarily follows that the statute was constitutionally applied to defendant and the trial court did not err in sustaining the Government's objections to the introduction of such testimony.

## CHALLENGED EVIDENTIARY RULINGS

The trial court sustained the Government's objections to a variety of questions asked by defendant's counsel both on direct and cross-examination. The record is replete with succeeding offers to prove. Further, defendant's counsel complains of the trial court's adverse rulings in certain aspects of his examination of Government witnesses. We have read the entire record pertaining to these evidentiary rulings and have noted the parade of the jury in and out of the courtroom as required in such instances.

For the most part, defendant's motions in these respects do not merit detailed consideration. The trial court ruled properly when questions were obviously improper as to form; when the evidence sought was irrelevant or immaterial; and particularly so when the answers sought were not proper under the rule relating to the issue of willfulness as we have determined it to be in this case.

A few instances will suffice. There was *no dispute* that defendant's income tax returns were *unseasonably filed* and his income taxes were paid *when past due.* Defendant contends the trial court erred in refusing to allow admission in evidence of his federal income tax returns for the years 1962 through 1968, inclusive, and the work copies of those returns. The trial court denied the introduction of a Xerox copy of an Illinois death certificate with respect to the death of Arthur J. Wilson, formerly defendant's accountant, who had been employed at some time to work on defendant's tax returns but had never completed them. Wilson's death was not disputed. Defendant unsuccessfully sought to introduce a series of longhand yellow worksheets purporting to be legal matters in which he had been professionally engaged during the years 1958 through 1970, apparently to establish that he had a busy and demanding law practice. The testimony of various witnesses was excluded where defendant attempted to show that he was more concerned with people than with making money; the detailed manner in which his secretary took care of his personal financial matters; conversations between defendant and his accountant (following Wilson's death) concerning his tax returns which this accountant eventually prepared and were executed and filed by defendant; and numerous other irrelevant personal matters.

It has been clearly established that late filing and late tax payment are immaterial on the issue of willfulness in a Section 7203 prosecution. In *Sansone, supra,* the Court said: "[W]e agree that the intent to report the income and pay the tax sometime in the future does not vitiate the willfulness required by §§ 7203 and 7207 * * *." 380 U.S. at 354. In *Spies, supra,* the Court said: "Punctuality is important to the fiscal system, and these are sanctions [referring to willful failure to make a return] to assure punctual as well as faithful performance of these duties." 317 U.S. at 496. See *Fahey,* 411 F.2d at 1214; and *Matosky,* 421 F.2d at 413.

It is also obvious that the proffered testimony excluded by such rulings could not serve to impeach a Government clerk who had merely testified that her search in 1968

of Internal Revenue index files did not reveal that defendant's tax returns had been filed. Accountant Wilson's death was well known to the jury because of defendant counsel's repeated references to it during the trial. Defendant's widespread, busy, private and civil rights-related law practice, together with his distinguished record of public service in a broad range of activities, were fully disclosed to the jury in defendant's personal testimony in his own defense. He was granted wide latitude in such testimony.

Based upon our detailed examination of the entire record relating to all of the challenges of defendant to evidentiary matters, we have concluded that the trial court did not prejudicially err in such rulings and that there are no adequate grounds for a reversal resulting from the same.

## MISCELLANY

A few of defendant's claims of prejudicial error merit only passing comment.

He charges the method of selecting the jury was improper, citing Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C.A.[4] He now asserts that the trial court erred in limiting each side to three peremptory challenges because the defendant's total punishment could and did exceed one year. The short answer to this is that defendant was charged in one information with four counts of the same offense, a misdemeanor, for which the statutory penalty is not more than one year or a fine or both. He cites no supporting authority. The rule is to the contrary and the trial court properly granted only three peremptory challenges to each side. More than one count properly joined in one indictment or information does not increase the number of peremptory challenges to which a defendant is entitled. It is foreclosed by the

[4] Rule 24(b), in relevant part, reads:

"(b) Peremptory Challenges. • • • If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges."

statute itself. *Nestlerode* v. *United States*, D.C. Cir., 122 F.2d 56, 58-59 (1941).

Defendant further asserts, without supporting authority, that he was denied due process under the Fifth Amendment because the Government used two of its peremptory challenges against the only two Negroes in the *jury box*. There was no showing or claim of the systematic exclusion of Negroes from federal juries in the Northern District of Illinois based on an invidious discrimination. The race of the veniremen excused by counsel does not appear in the record. Assuming that the two jurors in question were Negroes, there has never been any suggestion that the prosecution was racially biased or the trial so corrupted. The Government aptly points to the record showing that when the trial judge made his ruling the defense counsel stated in open court: "I think it can be read fairly both ways. We will abide by your Honor's ruling." Defendant later used this ruling as one of his grounds in a motion for a new trial. The trial court did not err in its ruling. *See Swain* v. *Alabama*, 380 U.S. 202, 221 (1965).

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Defendant charges that he was denied a fair trial due to the trial court's charge to the jury. He asserts the court erred in rejecting his tendered instructions Nos. 6 and 14, and in giving Government's tendered instructions Nos. 3A, 3B, 4, 5, 5A, E, F, Q and T-1. We have reviewed each of such instructions and the instructions given as a whole. Government's instruction No. T was substituted for defendant's No. 6, and is a better and more complete instruction on the subject of defendant's good reputation, subsequently more fully referred to herein. His tendered instruction No. 14 on the subject of his metal condition was properly rejected as going beyond that warranted in a prior holding of this court. Those given by the court have been approved in form or substance by our court or other federal courts. It would unduly prolong this opinion to treat each one in detail. We find no error concerning any of those challenged. Based on our examination of such instructions given as a whole, we are left with the fixed conclusion that the jury was adequately and properly instructed in all respects and that defendant was not deprived of a fair trial as a result thereof. In fact, as we

read the instructions as a whole we find they appear to be more favorable to the defendant than to the Government.

---

Defendant presented a number of eminent and distinguished persons who testified that on April 15, 1970, the date the instant information was filed, his general reputation for truth and honesty in the community wherein he worked was good. All of such witnesses had had a personal relationship with defendant in the past, either socially or professionally. These witnesses were Mahalia Jackson, gospel singer; Edward Levi, President of the University of Chicago; Ramsey Clark, former Attorney General of the United States; Monsignor John Egan, clergyman and then associated with the University of Notre Dame; Roy Wilkins, Executive Director of the National Association for the Advancement of Colored People; Martin Luther King, Sr., minister of the Ebeneezer Baptist Church, Atlanta, Georgia; R. Jess Brown, educator and Mississippi lawyer; Dominic A. Tesauro, Chicago lawyer and former Regional Administrator of General Services Administration; and Dr. Stanley Korff, Chicago dentist.

On the subject of evidence of defendant's reputation the trial court instructed the jury as follows:

> "The defendant, you recall, had introduced evidence tending to establish his good reputation in his community prior to the indictment in this case. Such evidence may indicate to you that it is improbable that a person of good character would commit the crime or crimes charged. Therefore the jury should consider this evidence along with all the other evidence in the case in determining the guilt or innocence of the defendant. The circumstances may be such that evidence of good character alone may create a reasonable doubt of the defendant's guilt, although without it the other evidence would be convincing. However, evidence of good reputation should not constitute an excuse to acquit the defendant if the jury, after weighing all evidence, including the evidence of good character, is convinced beyond a reasonable doubt that the defendant is guilty of the crime or crimes charged in the information."

We consider this instruction to be proper and adequate statement of the applicable law. We must conclude that the jury considered this evidence, along with all the other evidence in the case, in determining that defendant was guilty as charged.

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Defendant timely filed a pre-trial motion requesting the trial court to suppress from evidence his federal income tax returns filed for the years 1963 through 1966 and to suppress from evidence the testimony of Internal Revenue Agents derived from audits of defendant's records, obtained during conversations with defendant or statements made by defendant to the agents.

The argument against the use of the tax returns is that such use would be in violation of his Fifth Amendment privilege against self-incrimination. He predicates this argument on the premise that mere failure to make a return must be equated with an attempt to evade or defeat the tax. We have already rejected this premise in considering the validity of Section 7203, *supra*. To our knowledge no court has held the self-incrimination privilege to be a good defense to a Section 7203 charge of willful failure to make a return. The indication seems to be to the contrary.

The Supreme Court has held in effect that the Fifth Amendment does not protect the recipient of such income from prosecution for willful refusal to make any return under the income tax law. *United States* v. *Sullivan*, 274 U.S. 259, 263 (1927). In *United States* v. *Keig*, 7 Cir., 334 F.2d 823, 827 (1964), a prosecution under Section 7203 for willful failure to make income tax returns, we laid down the same rule, citing *Sullivan*. The argument that the use of such returns as evidence of his obligation to file or as evidence of his gross income would violate his right to due process is similarly untenable.

Defendant raises the same Fifth Amendment contentions with reference to the admission of the testimony of the Internal Revenue Agents above mentioned. He appears to rely upon the alleged failure of the agents to give him the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436

(1966). He claims this is the logical extension of our holding in *United States* v. *Dickerson*, 7 Cir., 413 F.2d 1111 (1969), and that we should re-examine our decision "to apply our holding to interrogations taking place after the date of the decision [July 28, 1969]." Since the interrogations in the case at bar took place *before* our decision in *Dickerson*, he is not entitled to its application here. *United States* v. *Gallagher*, 7 Cir., 430 F.2d 1222, 1224 (1970), *cert. denied*, 400 U.S. 956. It is reported that almost all other circuits have rejected our *Dickerson* application of the exclusionary rule in *Miranda* to taxpayers in criminal tax investigations.[5] We see no need to re-examine our limited prospective application of *Dickerson*.

We hold that the trial court did not err in denying defendant's motion to suppress.

## BRIEF OF AMICI CURIAE

We granted leave to a group of nine "concerned members" of the bar of this court to file a brief as *amici curiae* in support of defendant-appellant. We have carefully considered this brief. The members of the group are all eminent lawyers and legal scholars. With commendable candor they admit they "interested themselves in this case because of their regard for and concern about a distinguished colleague at the bar whose long career demonstrates courage, compassion, professionalism and commitment to *pro bono publico* work in the highest traditions of the bar." In this respect they acknowledge kinship to the "eminent witnesses testifying to his character, reputation and the nature of his professional work," we have hereinbefore referred to. In addition to their personal concern for defendant, they find "a basic and disturbing confusion" underlying the meaning of "willfully," the key term for the requisite state of mind as it is used in Section 7203, the misdemeanor statute. They further suggest that the Seventh Circuit appears not firmly committed to a construction of the term "willfully" in the misdemeanor statute, Section 7203, different from that used in the felony statute, Section 7201, which requires a "state of mind approaching an intent to evade taxes."

[5] Merten's, Law of Federal Income Taxation, § 55A. 21, Note 13.26, 1972 Cumulative Supplement, Vol. 10, page 18.

We have rejected this contention in our discussion of the validity of Section 7203. With deference to the distinguished *amici*, we reiterate that our holding in *Matosky*, 421 F.2d at 413 following *Sansone*, *Spies*, *Schipani* and *Fahey*, *supra*, is fully dispositive of this question in this circuit. Further, we see no "sharp split between the Circuits as to how to handle 'willfully'" in the misdemeanor statute.

*Amici*, relying upon their statement that defendant's "returns were in and his taxes for the years charged were paid well prior to the time the prosecution was initiated," find that this led the trial court into fatal error. We have already passed upon the court's exclusion of the returns themselves for the years involved and evidence that the taxes were paid before the prosecution was initiated. However, further error is asserted because the trial court admitted in evidence, over objection, evidence that defendant had not timely filed his returns in the seven successive years immediately preceding the years charged, these being barred from prosecution by the statute of limitations.

It is well established in this circuit that evidence of other related offenses is clearly admissible to prove knowledge and intent of a person accused of a crime. Here, the other offenses involved were *identical* to those charged. There was no hiatus between the preceding seven years and the four charged. The conduct of the seven immediately preceding years was relevant to the issue of knowledge and intent as tending to show a constant pattern of conduct. This is the recent explicit holding of our court, authored by Senior Circuit Judge Duffy, in *United States* v. *Hampton*, 7 Cir., ..... F.2d ..... (slip opinion No. 18422, March 3, 1972). *United States* v. *Marine*, 7 Cir., 413 F.2d 214 (1969), and other relevant cases in this and other circuits as cited in *Hampton*, with comment. Suggested contrary inferences in other circuits by the *amici* are readily distinguishable from the case at bar.

*Amici* further suggest an inability to understand what it is that moves men to fail to file income tax returns; they are astonished by the disproportionate number of misdemeanor cases which involve lawyers; and have noted

the uneven sentences given in a number of such cases. We do not profess to have the answers to such questions. We do know from defendant's own testimony that he did not timely make his required tax returns; that he knew he was required to do so; and that he knew he had not complied with such legal obligation. He had no "bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained," as required in *Matosky, supra.*

Misdemeanor convictions under Section 7203 are not unique insofar as eminent scholars and distinguished members of the bar are concerned. They are well known to all who have had to deal with them. With his outstanding record of service, both public and private, defendant was one of a select group who attracts the immediate sympathetic support of his peers who feel impelled to rescue him from the belated predicament in which he finds himself. This always leads to the willingness of friends of the highest standing to testify truthfully that he was a man of good reputation when he got into trouble. This, in turn, subjects a trial court and jury to great pressures, as it is properly intended to do. On conviction, as in the case before us, not infrequently similar pressures are brought to bear by lawyers who are genuinely concerned with the fate suffered by their colleague. However, on consideration of all issues presented, we cannot in good conscience hold that defendant did not receive a fair trial. In our judgment, he did.

Lurking in all appeals of this character is the inference that the trial court imposed an excessive punishment. The statutory maximum is one year's imprisonment and a fine of $10,000 on each count. The sentence imposed was four months and a fine of $1,250 on each count, the sentences to run consecutively. The sentences were one-third and the fines one-eighth of the maximum, well within the statutory limits. Whether the sentences should have been made to run concurrently or probation granted in whole or in in part, is beyond our jurisdiction. Such questions lie within the reasonable discretion of the trial court. Whether or not we would have assessed such penalties is beside the point and we express no opinion on that question. The case

does not come within any of the categories of "exceptional cases" concerning excessive punishment as delineated in *United States* v. *Humphreys*, 7 Cir., ..... F.2d ..... (No. 71-1137, February 25, 1972, slip opinion pages 5-6), with which opinion we are in agreement.

Without further extending this opinion, we hold that the judgment of conviction and sentence appealed from are in all things affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

## APPENDIX B

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

June 26, 1972

Before
Hon. Luther M. Swygert, *Chief Judge*
Hon. John S. Hastings, *Sr. Circuit Judge*
Hon. Roger J. Kiley, *Circuit Judge*

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

No. 71-1083 vs.

WILLIAM R. MING, JR.,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(70 CR 213)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS ORDERED that said petition be and the same is hereby denied.

# U. S. TREASURY DEPARTMENT
## INTERNAL REVENUE SERVICE

## REQUEST FOR TRANSCRIPT OF ACCOUNT

To:

DISTRICT DIRECTOR OF INTERNAL REVENUE

It is requested that your office furnish the following information regarding the taxpayer named on the reverse of this form.

☐ Handwritten transcript and/or photocopy of Unit Ledger Cards

_____ copies of a formal certified Form 899

THIS REQUEST IS FOR THE PURPOSE OF

| TAXABLE PERIOD | ACCOUNT NUMBER *(Include year or assessment date)* | IS RETURN IN THE POSSESSION OF REQUESTER? | |
|---|---|---|---|
| | | YES *(Attach return)* | NO |
| | | | |
| | | | |
| | | | |
| | | | |

*(Only one taxable entity and one type of tax can be requested on each form)*

Francis E. Vallee, Special Agent
Intelligence Division Room 1314-D I:D
Chicago, Illinois

**REQUESTER**
Insert your name, address, and office symbol here

Use space below for business names, aliases, changes of address and any other information that may assist in locating accounts.

**ADDITIONAL INFORMATION NECESSARY**

☐ Transcript of all assessed liabilities outstanding

☐ Record of any unidentified collections from taxpayer

☐ Complete collection activity information

☐ Other _____

Over

# CERTIFICATE OF ASSESSMENTS AND PAYMENTS

| NAME OF TAXPAYER | ADDRESS (Number, street, city, and State) | CLASS OF TAX | DATE OF REQUEST |
|---|---|---|---|
| William R. Jr. & Irvena H. Ming | 1037 East 49th Street, Chicago, Illinois 60615 | Income | 11-30-67 |

| TAXABLE PERIOD (a) | ACCOUNT NUMBER (b) | RECEIVED OR SCHEDULED DATE (c) | DESCRIPTION (d) | LIABILITY AND (ABATEMENT) (e) | PAYMENTS AND CREDITS APPLIED (f) | BALANCE (g) | REFUNDS AND CREDITS ALLOWED (h) | SUPPLEMENTAL INFORMATION (i) |
|---|---|---|---|---|---|---|---|---|
| | | | | | | | | |
| 1955 ES 1955 | BF-104336-56 | 5-8-56 | Return full paid | 749.15 | 749.15 | 00 | | No record |
| 1956 ES 1956 | | | | | | | | " " |
| 1957 ES 1957 | | | | | | | | " " |
| 1958 ES 1958 | | | | | | | | " " |
| 1959 ES 1959 | | | | | | | | " " |
| 1960 ES 1960 | | | | | | | | " " |
| 1961 ES 1961 | | | | | | | | " " |
| 1962 ES 1962 | | | | | | | | " " |
| 1963 ES 1963 | | | | | | | | " " |
| 1964 ES 1964 | | | | | | | | " " |
| 1965 ES 1965 | | | | | | | | " " |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, payments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

| SIGNATURE OF DISTRICT DIRECTOR | LOCATION | DATE |
|---|---|---|
| [signature] | Chicago, Illinois | 1-26-68 |

:C:T:A:3J

Over

FORM 899 (REV. 7-

## APPENDIX D

223 ROSE CHOWANEK, a witness called by the Government, having been first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Breakstone.*

Q. Will you state your name, please.

A. Rose Chowanek, C-h-o-w-a-n-e-k.

Q. Your occupation, please, Mrs. Chowanek?

A. I am a taxpayer's representative for the Internal Revenue Service.

Mr. Reid: I didn't hear the first part.

The Witness: Taxpayer's representative.

By Mr. Breakstone:

Q. For how long have you been so employed?

A. As a taxpayer's representative for the last three years.

Q. Prior to that assignment, what was your assignment?

A. I was a supervisor of the certification group
224 for about seven years.

Q. Certification of what?

A. Of taxpayers' accounts.

Q. How long have you been employed by the Internal Revenue Service in toto?

A. 22 years.

Q. Are you familiar with the organization of the records of the Internal Revenue Service which show whether or not returns have or have not been filed?

A. Yes.

Mr. Reid: Objection.

The Court: I will let her answer over objection.

The Witness: Yes, I am.

By Mr. Breakstone:

Q. What procedures were used by the Internal Revenue Service here in Chicago to determine if each and every taxpayer in the district of Chicago has timely filed his returns during the years 1963 through 1966?

A. An index card was prepared for each taxpayer that filed an income tax return.

Q. How do you determine if one has or has not
225 filed his return?

A. By checking our index records.

Q. You were asked, were you not, to examine the records of the District Director's Office for the purpose of ascertaining whether or not William R. Ming, Jr., timely filed federal income tax returns for the years 1963, 1964, 1965 and 1966, were you not?

Mr. Reid: Objection, your Honor.

The Court: I will overrule the objection.

You may answer.

The Witness: A. Yes.

Mr. Breakstone: Q. Did you make that examination?

A. Yes, I did.

Q. Please describe what records you first searched.

A. I searched the—

Mr. Reid: Your Honor, I have another objection. Excuse me, Mrs. Chowanek. I have no indication from the question as posed as to time, the time that this was asked to be done or done.

226 The Court: You mean the time of the search?

Mr. Reid: The time of the search or the time of the request for the search. It could have been done yesterday.

The Court: You may fix the time, Mr. Breakstone.

Mr. Breakstone: Q. Will you please tell the Court and the ladies and gentlemen of the jury when this search was first made?

A. I searched the records in 1968 for the years in question.

227 Q. Now would you please tell us what records you first searched.

A. I searched the index, the Internal Revenue index files for 1963, 1964, 1965 and 1966.

Q. Under what name did you so search?

A. I searched under Ming, M-i-n-g, and the variations, M-a-n-g, M-e-n-g, M-o-n-g and M-u-n-g.

Q. What first name did you use?

A. William R., Jr. and Irvina.

Q. Have you searched all of the records under the name of William R. Ming, Jr. which would show whether or not the defendant William R. Ming, Jr. has timely filed income tax returns for the years that I have mentioned, that is, 1963 through 1966?

Mr. Reid: Objection, your Honor, as to form. It calls for a conclusion.

The Court: I will let her answer the question over objection.

The Witness: A. Yes, I have.

Mr. Breakstone: Q. What did you find?

A. No record.

Q. Did you do this for each of the years that I have

228 mentioned?

A. Yes, I have.

Mr. Breakstone: Your Honor, at this time the government intends to offer into evidence testimony as to—

Mr. Reid: Just a second, Mr. Breakstone.

May we have a conference first before we make a statement in front of the jury? I don't know what he is going to say, your Honor, but before he makes his statement—

The Court: There is no obligation on the part of the United States Attorney to submit everything he says to you before he addresses the Court.

Mr. Reid: No, your Honor.

The Court: And I wouldn't permit him to make that request of you. I assume that the United States Attorney wants to make a request of the Court or give the Court some information that he thinks is appropriate. If it turns out that it isn't, we will deal with any objection to it you may have. There is no obligation to submit any statement—I don't know what he is going to submit. I can't rule in advance.

229 Mr. Breakstone: Perhaps, your Honor, it would be best if we did excuse the jury as I have a brief statement to make.

The Court: All right. We will excuse the jury.

(Whereupon the following proceedings were had in open court, outside the presence and hearing of the jury:)

Mr. Reid: May the witness also be excused?

The Court: Yes, certainly.

You will please step across the hall into the witness room and I direct you not to talk with anybody about this case or let anybody speak with you about it until you resume the stand, which may not be this afternoon.

(Witness temporarily excused.)

Mr. Breakstone: Your Honor, at this time the government felt that it was incumbent upon it to make a representation to the Court before proceeding to do it. So it is now the government's intention to submit evidence on prior years' failure to file for the years 1956 through 1961 so as to establish the pattern of conduct which I repeated earlier, and I would ask, of course, that a limiting instruction be given at the
230 appropriate time that it is only being given to go to the question of wilfullness and the defendant's intent. I plan to do that through this witness.

The Court: I am not going to instruct the jury before an appropriate time. I don't think it was necessary to tell me that you intended to do it because as I understand the law, pattern of conduct on the part of a taxpayer may be shown under the authorities.

Mr. Reid: Your Honor, may I respond to that?

The Court: Yes. I didn't ask you any question, so there is no response but you may comment on my observation if you want.

Mr. Reid: I would like to point out to the Court at this time that the defense is taken completely by surprise by what Mr. Breakstone is about to do, contrary to Mr. Breakstone's statement. We did not come to this trial prepared to meet any years 1956 through '60 or '61 or whatever he purports to show. The first time we hear this was Monday when he said in this courtroom to your Honor what it was he purported to show. Now we could have probably met that by going
231 to our warehouse and other situations and come in here with records to show the positive as opposed to the negative, that it doesn't show in some index card, but we are not prepared because of the nature of this

case where we have a 1962 return filed that the statute has run on, which clearly buffers any prior intent on the part of the taxpayer, and we also purport to show to the Court in our case if we are obliged to go forward, that the accountant, well-known to Mr. Breakstone because he had the statements from Mr. Ming, that Mr. Wilson died in May of 1967—in fact, May 22nd, 1967, and Mr. Vallee knew this, Mr. Wassenar testified on the stand that he knew this, that he was doing some work for Mr. Ming, and now to come in when we don't have any records and we have a dead accountant on our hands, and to bring up some testimony with respect to—

The Court: You mean you haven't been able to find a place to bury him? You have a dead accountant on your hands? You are in trouble.

Mr. Reid: His burden is still with us, your Honor.

The Court: Since when is that a legal argument
232 against presentation of proper evidence?

Mr. Reid: It is one that goes to my argument of surprise, your Honor.

The Court: There is no obligation on the part of an adversary to tell you just what his proof is going to be. He doesn't even have to make an opening statement. You know, I have had the government waive an opening statement. You seem to have a notion when you say that you are taken by surprise that there is an obligation of the government to tell you each and everything that it intends to prove. There is no obligation of the government to tell you each and everything that it intends to prove. There is no obligation.

Mr. Reid: Your Honor, I have another point to my argument which I would like the Court to consider, and that is this—

The Court: That is what you do all the time. You make a point and then when I am against you you make another point.

Mr. Reid: Your Honor, I have several points.

The Court: I tell you, that it is not in my opinion, grounds for denying the offer of evidence, denying a party the right to offer evidence, that his adversary
233 might be surprised or is surprised, if you are surprised. I am willing to assume for the sake of this discussion —not actually but for the sake of this discussion that you might have been surprised. That doesn't affect the admissibility of evidence if it is otherwise admissible.

Mr. Reid: May I address myself now, your Honor, to admissibility?

The Court: You may. I excused the jury so you might talk.

Mr. Reid: Now, your Honor, if the Court please, in this particular case, on the unique facts of this case, contra to any of the cases cited by the government in support of its position, we have the following factual circumstances: This case I state to your Honor is unique in this respect, and I say that Mr. Breakstone has no case that has the factual circumstances of this case. This is our case, the one that is being tried in this court today.

The Court: Well, if what you say is true, that is not a defense. I have decided many cases—and I don't by making that observation intend to say that I agree with you that this is either unique or a case of first impression. I have tried many cases of first impres-
234 sion. You will find them in the books. That doesn't mean that a defendant who might have been guilty of the acts charged in an indictment may not be prose-

cuted because it is a case of first impression. I don't think from what I have heard thus far that it is a case of first impression.

Mr. Reid: May I continue to tell your Honor what I think the facts are that are unique that are in this case and that I think your Honor should consider?

The Court: Uniqueness isn't a valid ground for objection to doing what the United States Attorney has indicated he proposes to do.

Mr. Reid: Your Honor, remoteness is.

The Court: It is unique that Mr. Pincham is in a tax case over there but that doesn't defeat his right to be here to represent Mr. Ming, does it?

Mr. Reid: No, your Honor.

The Court: I don't know what you mean by unique. You mean illegal?

Mr. Reid: I would like to point out two legal factors as applied to the facts in this case, that I think your Honor should consider.

235 The Court: Get to it. Raise your legal points. I want to give you a ruling. Make an appropriate motion and I will rule on your motion.

Mr. Reid: We wish to exclude as evidence on the following basis this evidence: Number one, it is remote.

The Court: You wish to have the evidence excluded?

Mr. Reid: Yes, that is correct, your Honor. It is remote and it is remote because as to 1962, the statute had run on that. That was filed and the taxes were paid. Now Mr. Ming, the evidence will show—

The Court: This is not a tax evasion case, Mr. Reid. There are authority that indicate clearly that a pattern of conduct by a taxpayer in failing to timely

file his tax return may be shown even though those returns do not deal with the years referred to in the information.

Mr. Reid: I understand that, your Honor, but the point I would like to make in my last and perhaps most important point is—

The Court: Get to it. Make it.

Mr. Reid: I am trying to, your Honor, and that
236 is this: There is a doctrine in the law that if the evidence offered is not probative but, on the other hand, is very prejudicial, that your Honor in your discretion may exclude it.

Now we believe that this has no probative value for the following reasons: Here is a woman that testified in 1968 she reviewed these records and returns for the years 1963, '64, '65 and '66, and they were not filed, when the evidence in this record today is contra to her testimony on the stand just now. Now how could she go back to '56 on and make the same evidence? It is remote, Judge, and it is prejudicial.

The Court: I don't know what the word "remote" means as you use it here.

Mr. Reid: It is not probative.

The Court: I can only tell you, basing what I am saying on the statement of the United States Attorney, that it is appropriate to offer the kind of proof he has suggested to me the government proposes to offer. When it is offered, you may make an objection to it. You may not object in advance, but if you do, I overrule the objection based on the United States Attorney's suggestion as to what proof he intends to offer.
237 Bring in the jury and let them stand in front of the jury box.

Let the witness be brought in, please.

(Whereupon the following proceedings were had in open court, within the presence and hearing of the jury and the witness:)

The Court: Ladies and gentlemen of the jury, we are about to recess now until tomorrow morning at ten o'clock. I must order you not to talk with anybody about this case or permit anybody to speak with you about it and not to discuss it among yourselves.

Mr.—Mrs. Chowanek, I order you to return here tomorrow morning at ten o'clock, please, and not to talk with anybody about this case or let anybody speak to you about it until you resume the stand.

Marshal, ten o'clock tomorrow morning.

(Whereupon an adjournment was had at 4:30 o'clock p.m. until the following day, October 28, 1970 at the hour of 10:00 o'clock a.m.)

• • • • •

240 ROSE CHOWANEK, a witness called by and on behalf of the Government, having been previously duly sworn, was examined and testified further as follows:

Mr. Pincham: So there is no conflict, it is my understanding that at the conclusion of yesterday's hearing, we were at the point of discussing with the Court the admissibility of the offer of the government with regard to the years prior to those alleged in the information. It was my understanding that that issue had not been resolved. Mr. Breakstone is of the opinion that it was.

Mr. Breakstone: I believe your Honor said at the close of the session that you were overruling Mr. Reid's objection.

The Court: What do you say the state of the rec-
241 ord is, Mr. Pincham?

Mr. Pincham: I am not certain, that is all I am saying.

The Court: I can't rule on anything that you are uncertain about, especially if you don't tell me what you are uncertain about.

Mr. Pincham: I am uncertain, Judge, as to what ruling your Honor made with regard to the admissibility of evidence.

The Court: I can tell you that evidence of a pattern of conduct by the defendant—I said that and I thought I was very clear about it—is admissible.

Mr. Pincham: This will go in, of course, over our objection.

(The following proceedings were had in open court, in the presence and hearing of the jury:)

The Court: Ladies and gentlemen of the jury, good morning.

Mr. Breakstone, will you proceed, please, with the direct examination of this witness.

Mr. Breakstone: Yes, your Honor.

242 *Direct Examination (Resumed).*

Mr. Breakstone: Q. Mrs. Chowanek, you are the same Rose Chowanek who was a witness here late yesterday afternoon, is that correct?

A. Yes, I am.

Q. May I remind you, please, that you are still under oath.

Mrs. Chowanek, yesterday I believe you testified that you could find no record of William R. Ming, Jr. having timely filed tax returns for the years 1963 through 1966, is that right?

Mr. Reid: Objection, your Honor. My objection is based on the fact that no time was placed specifically by this witness as to when she inquired.

The Court: When she what?

Mr. Reid: When she examined the records.

The Court: You are changing your first statement. You first used the word "inquired." Now you use the word "examined."

Mr. Reid: Well, whatever she did examine, there is no time laid for whatever she did.

243 The Court: Ask the witness when she did what she said she did, Mr. Breakstone.

Mr. Breakstone: Yes, your Honor.

Q. When did you make your search of the records?

A. In 1968.

Q. What was the result?

Mr. Reid: I am still objecting. That is not specific enough.

Mr. Breakstone: Q. Can you fix the time for Mr. Reid, please?

A. Yes. It was around between July and October, 1968.

Q. Now what did you find as a result of that search?

A. I found that there were no timely filed returns for the years in question.

Mr. Reid: Objection, your Honor. That is a conclusion and I move it be stricken and the jury directed to disregard it.

The Court: I overrule the objection.

244 Mr. Breakstone: Q. Now, Mrs. Chowanek, you were also asked to examine the records of the District Directors' office for the purpose of ascertaining whether or not William R. Ming, Jr. timely filed federal income tax returns for the years 1955 through 1962. Did you make such an examination?

Mr. Reid: Objection, your Honor, and I want to be heard on this, Judge.

The Court: I have been charged with many things but my hearing is not impaired, Mr. Reid.

Mr. Reid: My voice may have some volume, Judge.

The Court: I don't permit lawyers to shout at me and I never shout at a lawyer.

Mr. Reid: I understand, Judge. I appreciate that.

The Court: I expect the same courtesy from a lawyer that I extend to him.

Now what is your position, sir?

Mr. Reid: I have an objection and my objection is based on surprise. We did not come here to defend
245 on prior years.

Number two, your Honor, that is not material to the issues joined in this proceeding. It is not germane to the issues and it is entered solely for prejudice.

246 The Court: You may reply to the objection.

Mr. Breakstone: Yes.

The Government's position, simply stated, is that proof of prior years' failure to file tax returns goes to establish the issue of—

Mr. Reid: Your Honor—I am sorry. I don't want to interrupt a lawyer.

The Court: If you don't like to do it, don't do it. Don't do anything here that you don't like to do.

Mr. Reid: I would like to be heard outside of the presence of the jury if we are going to have a detailed discussion of the law.

The Court: I overrule your objection, sir.

Mr. Breakstone: Thank you, Judge.

The Government states that to sustain our burden of proof in this case, the Government by establishing prior years' failure to file will show a pattern of conduct of Mr. Ming that goes to the question of wilfulness.

247 The Court: What I meant to say is I overruled the objection to the testimony itself and I do so rule.

Mr. Breakstone: Q. Did you make such an examination?

A. Yes, I did.

Q. Now please describe what records you searched again.

Mr. Reid: Objection again. I would like to know when specifically he made this examination.

Mr. Breakstone: All right.

The Court: As best you can recall, please tell the jury.

Mr. Breakstone: Q. When was this search made?

A. On October 22nd of this year.

Q. And what did you do in making that search?

A. I checked the indexing for that name, Ming, M-i-n-g, and all the variations, M-a-n-g, M-e-n-g, M-o-n-g and M-u-n-g.

Q. Have you searched all of the records under the name of William R. Ming, Jr., which would show whether or not the defendant William R. Ming, Jr.

248 has timely filed income tax returns for the years that I have mentioned, that is, 1955 through 1962?

Mr. Reid: Objection.

The Witness: Yes.

The Court: I overrule the objection.

The Witness: A. Yes, I did.

Mr. Breakstone: Q. And what did you find?

A. I found that in 1955 a return was filed. '56 through '62 there was no record of a filing.

Q. Mrs. Chowanek, I now show you what has previously been marked as Government's Exhibit No. 1 for identification which purports to be a certificate of assessment and payments for an individual named William R., Jr., and Irvina H. Ming, and I ask you if you ever have seen that document before?

A. Yes, I have. This was prepared under my direction and supervision.

Q. Will you please state generally what is a certificate of assessments and payments?

A. It is a transcript of a taxpayer's account for
249 any year in question.

Q. When are certificates of assessments and payments prepared for taxpayers?

A. Upon request from a department in the Internal Revenue.

Q. And how is a certificate of assessments and payments prepared, Mrs. Chowanek?

A. A search is conducted for the years that are requested and the information is transcribed onto this document.

Q. When was Government's Exhibit 1 for identification prepared?

A. On January 26, 1968.

Q. And that document, Government's Exhibit 1 for identification, was prepared under your direction and supervision?

A. Yes, it was.

Mr. Breakstone: At this time I tender to defense counsel Government's Exhibit No. 1 for identification and move for its submission into evidence as Government's Exhibit No. 1.

Mr. Reid: Your Honor, the defense has an objection to this document. No. 1, this document is hearsay.
250 Nowhere on the document does Mrs. Chowanek's name appear or that she testified that she prepared it. Nor do I see her initials. It is extremely cumulative as to what she testified to, and, additionally, it is not accurate. It was prepared in January, 1968, and we have had Government testimony in the records so far that at that time the returns for '62, '63, '64 and '65 were prepared as shown by the Government's own case. This document shows no returns for those years. It is extremely inaccurate.

Also, your Honor, so far as a negative to prove a positive, it is remote. The mere fact that somewhere someone did the search without identifying who did the search and they came back with information that they found nothing is not evidence that anybody ever wilfully failed to file on time any tax return.

We say on those grounds, your Honor, it is entered only to prejudice the jury and should not be received in evidence.

The Court: You may reply to the objection.

251 Mr. Breakstone: Your Honor, I believe the proper foundation has been laid for the admission of this document into evidence. The witness has testified that the

document was made under her supervision and direction and we believe that it is relevant on the issues of this case and of course Mr. Reid has an opportunity to cross examine this witness if that should become necessary.

The Court: I will look at it if you will hand it to the Marshal, please.

(Document tendered to the Court.)

The Court: Over the objection of the defendant, the Court will admit into evidence Government's Exhibit No. 1 for identification as Government's Exhibit No. 1.

Mr. Breakstone: May I strike that identification mark, please?

The Court: You may.

(The document previously marked Government's Exhibit No. 1 for identification was received in evidence.)

Mr. Breakstone: Q. Mrs. Chowanek, referring to
252 Government's Exhibit No. 1, would you please from that exhibit tell the Court and the ladies and gentlemen of the jury what that record indicates as to whether or not tax returns had been filed for the years that are mentioned on that particular document.

Mr. Reid: Objection, your Honor.

The Court: It strikes me that that question, Mr. Breakstone, suggests the answer and is therefore objectionable.

Mr. Breakstone: All right, your Honor.

The Court: I sustain the objection.

Mr. Breakstone: Q. Would you please refer to the document and read, if you would, for the taxable period to which I am now pointing, the years 1955

through 1965 on this document, read what is in the label of description and also supplemental information for each of those years.

Mr. Reid: Objection, your Honor. The document is in evidence and the document speaks for itself.

The Court: I will let you read any document that comes into evidence as that is my practice always, and
253 I permit both sides to (sic) the jury any document in evidence.

I overrule the objection.

The Witness: A. This is a transcript for William R., Jr., and Irvina H. Ming. For the year 1955, a return was filed on 5-8-56. For 1956 there is no record of a return timely filed. 1957, there is no record of a return timely filed. 1958, there is no record of a return timely filed. 1959, there is no record of a return timely filed. 1960, there is no record of a return timely filed. 1961, there is no record of a return timely filed. 1962, there is no record of a return timely filed. 1963, there is no record of a return timely filed. 1964, there is no record of a return timely filed. And 1965, there is no record of a return timely filed.

Mr. Breakstone: Thank you very much.

Mr. Reid: Your Honor, I move that all of that previous testimony be stricken from the record.

The Court: I deny the motion.

Mr. Breakstone: No further questions of this witness.

The Court: Cross examination.

254 *Cross Examination by Mr. Pincham.*

Q. Mrs. Chowanek, it was between July and October of 1968 that you told the ladies and gentlemen of the jury that you made the search for the returns, tax

returns, of the defendant, William R. Ming, is that correct?

A. Yes, I did, but only for the years '62 through '66.

Q. I see. And some time between July and October of 1968 it is your testimony that in searching you did not find evidence of the filing of those returns, is that correct?

A. That is right.

Q. Now, do you know a Mr. Vallee of the Internal Revenue Service?

A. Yes. He's an employee of the Internal Revenue.

Q. And did you know him during July and October of 1968?

A. Yes, I have known him for many years.

Q. Did you check with him, Mr. Vallee, between July and October of 1968 to determine if he had the returns for Mr. Ming?

A. What years?

255 Q. I beg your pardon?

A. What years?

Q. When you were checking in July and October of 1968 for the returns of the defendant, William R. Ming, did you check with Mr. Vallee to determine if he had received Mr. Ming's returns for the years '63, '64, '65 and '66?

A. No, I didn't.

Q. Do you know a Mr. Richard Wassenaar?

A. Yes.

Q. And when you were checking in July to October of 1968 to see if Mr. Ming's returns had been filed, did you check with Mr. Wassenaar to see if he had received Mr. Ming's returns for the years '63, '64, '65 and '66?

A. No, sir.

Q. Did you, during the time that you were checking for the returns, from July to October of 1968, check with anyone in the Intelligence Division of the Internal Revenue Department to see if those returns had been received by anyone in the Intelligence Division of Internal Revenue Service?

A. No, I did not, sir. That's not our function.

256 Q. So when you said you had not received them—

Mr. Pincham: May I approach the witness, if the Court please?

The Court: Oh, yes.

Mr. Pincham: Q. I will show you what has been previously marked as Defendant's Exhibits 2, 3, 4 and 5 for identification. I will show you Defendant's Exhibit 2 for identification, and I will ask you if you will turn—right here, move this over. Do you see the word "Received, District Director of Internal Revenue" there?

A. Yes, I see the receipt stamp.

Q. And do you see the date August 6th, '68 there?

A. That is right, sir.

Q. Do you see "Chief, Intelligence" on there?

A. Yes.

Q. Do you know who placed that stamp on that document?

A. No, I do not.

Q. Do you know who the Chief of Intelligence is or was on the 6th of August, 1968?

A. I can't recollect at this moment.

Q. Did you check with the Chief of the Intelligence

257 Division at any time after August 6th, 1968, to determine if he had received the return of William R. Ming for the year 1963?

A. No, sir. That's not our function.

Q. All right. I will show you Defendant's Exhibit 3 for identification and ask you if you will examine the front of it where it is stamped "Received, District Director of Internal Revenue, October 11, 1967."

A. Yes, I see the stamp.

Q. Do you know who placed that stamp on there?

A. No, I do not.

Q. Is that a stamp that is of the Internal Revenue Service?

A. Yes. It says it is.

Q. At the bottom there is "Intelligence Division" under the date October 11, 1967.

A. That's right.

Q. Did you, after October 11, 1967, check with the Chief of the Intelligence Division to determine if he had received or if his department had received Ming's return for the year 1964?

A. No, sir. That is not our function.

Q. I see. I will ask you to examine the return for
258 1965, Defendant's Exhibit No. 4 for identification, and ask you if you know who placed the stamp on that return, "Received, District Director of Internal Revenue, October 11, 1967, Chief, Intelligence Division." Do you know who placed—

A. No.

Q. —that on there?

A. No, I do not.

Q. I will show you Defendant's Exhibit 5 for identification, being a return for 1966, and ask you if you know who stamped on it "District Director of Internal Revenue, Received October 11, 1967"?

A. No, I do not, sir.

Q. So in your searching the records, you are not testifying that these returns as of July to October '68 had not been received by the District Director of Internal Revenue, are you?

A. No. Sir, we were only requested—

Q. Just, please. May I? Just answer the questions. Thank you.

You are saying that your office—that is, your branch of the Internal Revenue Service had not received them as and of the time you checked, is that correct?

259 A. Yes.

Q. And so far as you know, the Intelligence Division of the Internal Revenue Service could have had the returns at the time you were checking without your having knowledge of it, is that correct?

A. Yes, it's possible.

260 Q. And in your checking it would not be your function to check with the Intelligence Division of the Internal Revenue Service to determine if in fact that branch of the Internal Revenue Service had received the returns.

A. No, it's not our function.

Q. And when you—by the way, by whom were you requested to make the search?

A. We received a request from the Intelligence Division to do a search for timely filed returns for Mr.—

Q. My question is simply, by whom.

A. By the Intelligence Division.

Q. All right. Now, in receiving that request, did you at any time talk to Mr. Wassenaar of the Intelligence Division?

A. Well, I have seen him around, but I cannot recall what was said, but I know it had nothing to do with the returns.

Q. Did you, in communicating with the Intelligence Division at any time talk to Mr. Vallee?

A. I saw him. He came into the department, and we spoke to each other, but the research was left up to us.

261 Mr. Pincham: I have nothing further of the witness, if the Court please.

The Court: Have you redirect examination?

Mr. Breakstone: Yes. One question.

*Redirect Examination by Mr. Breakstone.*

Q. Mrs. Chowanek, did the records that you searched show a record of delinquent filings?

Mr. Pincham: Objection.

Mr. Reid: Objection.

The Court: Why?

Mr. Pincham: It goes beyond the scope of the cross examination, if the Court please.

The Court: Oh, I think not. I will let the witness answer over objection.

The Witness: If we are requested, we do.

Mr. Breakstone: Q. And what was this request?

A. The request was to determine if timely filed returns were filed.

Q. What do you mean by "timely filed returns"?

A. The regular filing.

Q. So that if a return, we will say, for the year
262 1962 was filed after April 15, 1963, the records that you searched would not show that, is that correct?

Mr. Pincham: Objection.

The Court: I will let her answer over objection.

The Witness: A. The only research we do is for specific research. Our request was for specifically those years for timely filing.

Mr. Breakstone: Q. Would you please answer my question, Mrs. Chowanek? In this case.

Mr. Breakstone: Would you please read back the question.

(Question read by the Reporter.)

The Witness: A. Not those particular records.

Mr. Breakstone: Thank you. I have no further questions.

The Court: Within the limits of the redirect, I will permit recross examination.

Mr. Pincham: May I have her answer read, please, so that I can limit my—

263 The Court: Yes. The answer to the last question?

Mr. Pincham: Yes, your Honor.

The Court: Please read the answer.

(Answer read by the Reporter.)

Mr. Pincham: Thank you.

*Recross Examination by Mr. Pincham.*

Q. Are there other records that can be examined to determine whether a return has been filed or received?

A. Yes, there are. But only—

Q. Just, please, Mrs. Chowanek. There are, right?

A. Yes, there are.

Q. Did you check those other records to determine if the Internal Revenue Service had received Mr. Ming's returns for the years '63, '4, '5 and '6?

A. No, there was no request for that.

Q. There was no request for it?

A. No.

Q. You have not checked to see if, when you were looking in July to October of '68, whether the Internal
264 Revenue Service had in fact at that time received Mr. Ming's returns for those years?

Mr. Breakstone: I object, your Honor. There is no contention and there is no contest here that these returns were not filed. They were filed late. The Government doesn't contend that they weren't filed, but they were filed late, and I object to the question.

The Court: That is the position, as I understand it, from the pleadings here, from the indictment. I don't think it has been said here at any time, in the opening statement of the United States Attorney, that the returns were not filed at all. The question is timely filed.

Mr. Pincham: Well, it seems to me the jury is entitled to know that when Mrs. Chowanek was looking for the returns, the Internal Revenue Service already had the returns, and the witnesses have testified as to the date they received them.

The Court: No, I think the objection is a valid one. I will sustain the objection.

265 Mr. Pincham: Very well, your Honor.

Mr. Pincham: Q. The other place you would look, the other records to which you would refer, would that show when the returns were filed?

A. Yes. We would have to check each list year. We file by the list year, sir.

Q. And you did not check those records.

A. No, sir; I didn't.

Mr. Pincham: Thank you. I have nothing further.

Mr. Breakstone: Thank you, Mrs. Chowanek. No further questions.

The Court: You may go. Thank you.

(Witness excused.)

Mr. Breakstone: Your Honor, the Government rests its case.

The Court: Ladies and gentlemen of the jury, the Government has rested its case.

That means the Government has completed its evidence in what is known as the case in chief, and now it is my duty to excuse you for a little while to consider matters out of the presence of the jury.

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## APPENDIX E

### MOTION OF DEFENDANT, WILLIAM R. MING, JR., PURSUANT TO TITLE 28 U.S.C. SECTION 144.

Now Comes William R. Ming, Jr., defendant herein, and moves pursuant to Title 28, U.S.C., Section 144, that the Honorable Julius J. Hoffman, a judge of the District Court for the Northern District of Illinois, to whom this cause has been assigned for trial, proceed no further herein and transfer said cause to the Executive Committee of this Court for reassignment to another judge for trial. In support of this motion, movant states that Judge Julius J. Hoffman has a personal bias and prejudice in favor of plaintiffs, which personal bias and prejudice was not known to defendant until on or about October 23, 1970. Attached hereto and made a part hereof by reference is the Affidavit of William R. Ming, Jr.

### AFFIDAVIT

William R. Ming, Jr., defendant in this cause, on oath and duly sworn, states that in his view the judge to whom this matter is assigned, the Honorable Julius J. Hoffman, has a personal bias or prejudice in favor of the United States of America, a party in this cause. The facts and reasons for the belief of the defendant are as follows:

1. On or about Friday, October 9, 1970, in *United States of America* v. *Kusper, et al.,* the United States Attorney for this district filed a suit for injunctive and declarative relief against the Board of Election Commissioners of the City of Chicago in this court. Without notice, the United States Attorney obtained a temporary restraining order

from one of the judges of this court who was appointed by a Republican President, although that judge was not the one to whom this case has been regularly assigned. On October 12, 1970, affiant presented a motion to vacate that temporary restraining order. Affiant demonstrated that the statements of the Attorney General of the United States and the United States Attorney in that cause were untrue. The judge to whom the cause was assigned, a judge who had been appointed to this court by a Democratic President vacated the temporary restraining order. That judge required the parties to proceed to a hearing on the govenment's application for a preliminary injunction.

2. The Board of Election Commissioners of the City of Chicago, whose members are appointed by the Circuit Court of Cook County, are required to include among their three members not more than two persons from the same political party. Currently, the chairman and Mr. Francis P. Canary, one of the members, are Democrats. The remaining member is a Republican.

3. Defendant in the instant cause is also a member of the Democratic Party and has voted in the Democratic primary consistently for many years.

4. On October 16, 1970, this cause was then set for trial on October 19, 1970. The United States Attorney in this district, a Republican appointee, issued a *subpoena duces tecum* to Stanley T. Kusper, Jr., Chairman of the Board of Election Commissioners and one of the defendants in *United States of America* v. *Kusper,* for the voting and registration records of affiant to be produced in *United States of America* v. *Ming.*

5. A motion was made to reset this cause to a date after November 3, 1970, that being the date of the general elec-

tion, because of the large amount of publicity generated by agents of the United States in the *Kusper* case, together with affiant's connection therewith. That motion was denied by the Honorable Julius J. Hoffman.

6. On or about October 21, 1970, the United States District Court in *United States of America* v. *Kusper* ruled in favor of the defendants therein on the basis of the arguments made by the affiant.

7. On the next day the United States of America appealed from the order in that cause dismissing its complaint.

8. On its own motion, the Court of Appeals for the Seventh Circuit required counsel for plaintiff and counsel for defendants in *United States of America* v. *Kusper* to prepare and file before 4 P.M. on Monday, October 26, 1970, a memorandum with respect to the jurisdiction of the court and other legal questions. In addition, the Court of Appeals required that counsel for both parties hold themselves in readiness to appear on Tuesday, October 27, 1970, at 2 P.M. if the court should decide to expedite the case as requested by the United States of America.

9. Immediately upon the entry of the order of October 22, 1970, in *United States of America* v. *Kusper* by the Court of Appeals, a motion to reset *United States of America* v. *Ming* was prepared and filed with Judge Hoffman so that affiant could comply with the order of the Court of Appeals in the *Kusper* case.

10. On October 23, 1970, Judge Hoffman denied that motion to reset *United States of America* v. *Ming* to some date after October 27, 1970, and continued the matter for trial on October 26, 1970.

11. The effect of the court's denial of a two-day continuance in this case is to favor the United States in the *Kusper* case now on appeal as Docket No. 18838 in the Court of Appeals.

12. On November 30, 1966, in affiant's presence, in the case of *U.S.A.* v. *White,* 66 CR 254 and 255, Judge Hoffman commented strongly in favor of agents of the U. S. Treasury Department as follows:

> ". . . the most vicious thing in this case, Mr. Eskridge, other than the crimes themselves, a spectacle of a convicted felon taking that witness stand in the United States District Court and accusing brave young Treasury agents of perjury in every respect. • • • There you have the reason why, a defendant situated as he is, takes the stand and characterizes these brave men, these—young Jackson—I do not know whether he is here today, the man in charge of the case, and characterizes him as a perjurer."

13. One of the issues in this case will be the credibility of U. S. Treasury agents.

14. Affiant has known Judge Julius J. Hoffman for many years and has a high regard for him and as a result of comments made by the judge on occasion, believes the high personal regard to be mutual.

15. On October 23, 1970 affiant first realized that this bias of Judge Julius J. Hoffman in favor of agents of the United States would work to affiant's detriment in this cause. The allegations herein set forth demonstrate the bias and prejudice of the trial judge in favor of the plaintiff herein. Affiant therefore possesses a conscientious belief that said Judge Julius J. Hoffman is biased and

prejudiced in favor of the plaintiff and ought not to preside over this case or determine questions involved herein.

Further affiant sayeth not.

/s/ *William R. Ming, Jr.*
William R. Ming, Jr.

Subscribed and Sworn to
before me this 24th day
of October, 1970. Notarial seal
/s/ *Aldus S. Mitchell*
Notary Public

CERTIFICATE OF COUNSEL

Application is hereby made for the reasons set forth in the foregoing Affidavit that appropriate proceedings be taken under Title 28, Section 144 of the United States Code and I, Ellis E. Reid, counsel of record for the defendant, William R. Ming, Jr., hereby certify that said Affidavit and this Application are made in good faith and not for the purpose of hindrance or delay.

/s/ *Ellis E. Reid*
Ellis E. Reid

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SUPREME CT., U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972.

**No. 72-152**

WILLIAM R. MING, JR.,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

## BRIEF OF A GROUP OF CONCERNED MEMBERS OF THE ILLINOIS BAR AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI.

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IN THE

# Supreme Court of the United States

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**No. 72-152.**

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WILLIAM R. MING, JR.,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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## BRIEF OF A GROUP OF CONCERNED MEMBERS OF THE ILLINOIS BAR AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI.

---

### INTERESTS OF THE AMICI.

William Robert Ming, Jr. has been a member of the Illinois bar for 39 years. His professional career has included service as a Professor of Law at Howard University and at the University of Chicago, national distinction as a leader in the civil rights movement, a major role in the great days of constitutional litigation by the NAACP, and broad experience and eminence as a trial lawyer. He was charged on April 15, 1970 in a four-count information under Section 7203 of the Internal Revenue Code for the misdemeanors of failing to file his income tax returns for the years 1963 through 1966 by the April 15 deadline for them.

The returns for all four years were in fact filed by him and the taxes required under them paid in full well before criminal prosecution was begun or intimated (Tr. 264, 306, 566; Defendant's Exhibits 2-5, 8, 16). Indeed, the returns and payments for the years 1964 to 1966 inclusive were in the government's hands two and a half years before criminal charges were brought (Tr. 146-148). The criminal proceeding filed on April 15, 1970 raised no questions about Ming's tax returns or payments for 1967, 1968 or 1969 (R. 2).

Mr. Ming was convicted on each of the four counts, after a jury trial, and sentenced by District Judge Hoffman to serve four months in prison consecutively on each count and to pay a fine of $1,250 on each. The total penalty for his misdemeanors of filing late tax returns thus amounts to 16 months in prison and a fine of $5,000.

The undersigned *amici curiae* interested themselves in this case because of their regard for and concern about a distinguished colleague at the bar whose long career demonstrates courage, compassion, professionalism and commitment to *pro bono publico* work in the highest traditions of the bar.[1] Upon looking into this case, we have become convinced that a fundamental error has been committed. This error arises directly from the difficulties in interpretation of the key word "willfully" in Section 7203 under which Ming was tried and convicted. These difficulties have led, in our opinion, to a sharp split among the Circuits. Our reflections on the case and our discussions among ourselves have led us to a further point unanticipated by us at the start. We are now persuaded that there is a basic and disturbing confusion underlying this part of the crimi-

1. At his trial, eminent witnesses testifying to his character, reputation and the nature of his professional work included among others Edward H. Levi, Ray Wilkins, Ramsey Clark, Martin Luther King, Sr., Mahalia Jackson and Msgr. John Egan.

nal provisions of the Internal Revenue Code requiring scrutiny and clarification by the Supreme Court of the United States which has not looked at this problem since it did so in an atypical, abstract context 40 years ago in *Murdock* v. *United States*, 290 U. S. 389 (1933). Our *amicus* brief is therefore the product of twin concerns—one for our colleague, William R. Ming, Jr., and the other for the rational administration of the income tax system.[2]

---

2. Failure to file income tax returns does not at first seem very puzzling behavior; it seems easily understood as the first step in a strategy to evade taxes and to defraud the government. But the deeper one reflects on the problem, and the more one reads the cases, the more uneasy one is about this assumption and the more perplexing the behavior of non-filing becomes.

We are familiar with the tax difficulties of Edmund Wilson and Dean James Landis, surely among the most distinguished and productive men of their generation.

In reviewing tax misdemeanor cases, we have been struck by the disproportionate number which involve lawyers. *See e.g.*, *United States* v. *Fahey*, 411 F. 2d 1213 (9th Cir. 1969); *United States* v. *Gorman*, 393 F. 2d 209 (7th Cir. 1968); *Edwards* v. *United States*, 375 F. 2d 862 (9th Cir. 1967); *Ripperger* v. *United States*, 248 F. 2d 944 (4th Cir. 1967); *United States* v. *Perna*, 197 F. Supp. 853 (D. C. Conn. 1961); *United States* v. *Goodman*, 190 F. Supp. 847 (D. C. Ill. 1961); *United States* v. *Fullerton*, 189 F. Supp. 211 (D. C. Md. 1960); *United States* v. *DiSilvestro*, 147 F. Supp. 300 (D. C. Pa. 1957); *United States* v. *MacLeod*, 436 F. 2d 947 (8th Cir. 1971). See also *United States* v. *Doelker*, 327 F. 2d 343 (6th Cir. 1964) (certified public accountant); *United States* v. *Johnson*, 386 F. 2d 630 (3rd Cir. 1967) (architect).

On reflection, the non-filing of returns does not seem realistic as a long-term strategy for evading taxes to anyone at all familiar with the working of the system such as lawyers. Once a person at any point in his career has filed a return and thus identified and fixed himself within the records of the tax system, the arrangements for information returns and modern record-keeping make it virtually certain that a strategy of non-filing over any long period of time must fail. Moreover, failure to file makes an unusual crime in the sense that once committed it becomes highly predictable that it will be repeated in subsequent years, since the filing in a later year incriminates for the prior year. On the other hand, it becomes evident from the data in the reported cases and from introspection that a man under psychological pressures, in a variety of forms, might miss a first

In the proceeding in the court below, both the government and the court acknowledged the *amicus* brief filed by us. The government responded to it at length in its brief and the court devoted several pages of its opinion to our concerns.

We are filing herewith the consent of both of the parties to our appearance here as *amici*.

---

tax deadline hoping to make amends in the future, and then find it increasingly difficult to bail himself out of the situation he has created. In this connection, the *Fullerton* and *DiSilvestro* cases especially deserve a close reading.

We do not profess to understand what moves men to fail to file income tax returns; but we are persuaded that some substantial number of them at least are led to do so for perplexing and complex reasons which bear no resemblance to a conscious desire to cheat the government and other taxpayers. In any event, these puzzles as to the underlying psychology of the non-filer makes it all the more urgent that the criminal intent required under Section 7203 be thoughtfully and rigorously defined.

## ARGUMENT.

### I.

### There Is a Conflict in the Circuits.

It is a commonplace, and a great achievement, that the United States income tax system is essentially a system of self-assessment by millions of individual taxpayers. The reliance on self-assessment is buttressed by a scheme of sanctions both civil and criminal. The capstone of the sanctioning system is the felony of tax fraud found in Section 7201 of the Internal Revenue Code. See *Spies* v. *United States*, 317 U. S. 492, at 497 (1943). The civil sanctions, themselves formidable, consist basically of percentage additions to taxes in arrears which accelerate steeply the effective rate of tax. As a third wing of the enforcement strategy, there are the misdemeanor provisions of Section 7203. It is the misdemeanor and the misdemeanor only that is involved in this case.

Section 7203 in fact specifies four different types of conduct, each of which is a tax misdemeanor: failure to pay the tax or quarterly estimates thereof; failure to file a return; failure to keep records; and failure to supply information. To make each of these a crime, the statute requires that it be done "willfully."

All this looks reasonable and sensible on its face as a modest supplement to the civil sanctions and the felony sanction. In fact, however, almost from its inception, the statute has been in trouble over the meaning of "willfully," the key term for the requisite state of mind. *Murdock* v. *United States*, 290 U. S. 389 (1933); see also *Spies* v. *United States*, 317 U. S. 492 (1943); *Sansone* v. *United States*, 380 U. S. 343 (1965). A sharp split between the Circuits as to how to handle "willfully" has developed

and endured to this day. See *United States* v. *Fahey*, 411 F. 2d 1213 at 1214 (9th Cir. 1969) discussing the difference between the Ninth, Third and Fifth Circuits and even divisions within the Circuits, citing *Abdul* v. *United States*, 254 F. 2d 292 (9th Cir. 1958), *Haner* v. *United States*, 315 F. 2d 792 (5th Cir. 1963), *United States* v. *Vitiello*, 363 F. 2d 240 (3rd Cir. 1966), *United States* v. *Palermo*, 259 F. 2d 872 (3rd Cir. 1958). See also *United States* v. *Hartman*, 409 F. 2d 198 (3rd Cir. 1969). For a summary of these differences, see Orlando, *"Willfully" Under Section 7203 of the Internal Revenue Code of 1954*, 74 Dickinson Law Review 563 (1970). The Second Circuit has also explicitly acknowledged the conflict in *United States* v. *Platt*, 435 F. 2d 789 at 795 (2nd Cir. 1970).

Although the difference between the Circuits has its nuances, essentially the tension is between, on the one hand, the view of the Third and Fifth Circuits that "willfully" requires a state of mind approaching an intent to evade taxes and, on the other hand, the view of the Ninth, Seventh and Second Circuits that "willfully" reduces to simple consciousness that a deadline was missed otherwise than through mistake, negligence or the like.

## II.

### The Facts Here and Inconsistent Rulings Below Make This the Appropriate Case in Which to Resolve the Conflict.

This case is sharply set apart from the other income tax misdemeanor cases by the fact that for the years charged, the returns were filed and the taxes paid well prior to the time the prosecution was initiated.

Suspecting quite understandably that no jury would convict of a *tax crime* a defendant who had *in fact filed his returns and paid his taxes* prior to the initiation or threat

of the prosecution, the prosecutor strenuously objected to the defendant's proffer of such evidence, insisting that any use of such evidence was "a flagrant attempt to prejudice this jury"! (Tr. 566) The trial court excluded the evidence and was sustained by the Court of Appeals on the rationale that evidence of payment was irrelevant because the statute required only the most minimal intent; it thus reduced the *mens rea* meaning of "willfully" to the utterly nominal matter of consciously missing a deadline.

On the other hand, neither the court nor the prosecutor had the consistency, or indeed the fortitude, to stay with such an interpretation. The government offered some equivocal evidence with respect to non-timely filing of returns in years prior to those charged but barred by the statute of limitations.[3] The objective of this proffer of evidence was to beef up the government's proof of criminal intent. This time both the trial and appellate courts held the evidence admissible on the rationale that it was relevant to show the requisite criminal intent under the statute. Both courts were thus led into *inconsistent constructions of*

3. The evidence consisted solely of the testimony of a government clerk who stated that she confined her inquiry to searching a single index which covered only returns filed by April 15 of each year (Tr. 247-249, 253, 258-265). This index could not tell her anything about whether returns had been filed *later*, say on April 16 of each year (Tr. 261-262), nor could it tell whether taxes had been *paid* for any year. On the basis of her testimony, it is impossible to distinguish between *non-filing* and *late* filing, nor could it possibly tell anything about the circumstances with respect to the intent or willfulness of an individual taxpayer. The limitations of her testimony are indicated by the absurdity that she testifies that her index shows the non-filing of returns which were at that moment in fact in the hands of the very official of the Internal Revenue Service who directed her search to be made (Tr. 296-304). In these circumstances, the unqualified certification of Exhibit 1—which was given to the jury over objections—seems to us to be shockingly misleading.

*the same term "willfully" in the same statute for different pieces of evidence offered in the same trial.*

In the handling of this question, the court below adopted for one purpose the minimum intent rule of the Ninth, Second and Seventh Circuits but for another purpose utilized the substantial intent rule of the Fifth and Third Circuits. The point runs deeper than the obvious fact that the defendant got the worst of both worlds and the government the best of both. It serves to highlight the deep difficulties and confusions now attending the construction of the word "willfully" in Section 7203. The confusion is a general one not confined to this case; in light of the prevalence of the income tax today, intervention by the Supreme Court is therefore required.

## III.

### Massive Prosecutor Discretion Should Not Be Relied Upon to Save the Minimum Intent Rule.

We are now persuaded that the problem of the construction of "willfully" cannot be solved simply by adopting the minimal intent interpretation as the Seventh Circuit has done in this case.

It is a matter of common knowledge that thousands of income tax returns are filed late each year although presumably in almost all instances, the taxpayer knew what time it was. Moreover, as Section 7203 is drafted, the term "willfully" covers in identical language also the misdemeanor of late filings and late payments of estimated quarterly installments. Deadlines must in fact be passed in tens of thousands of such estimate cases each year. The radical difficulty with the nominal intent rule is that such a reading of the statute sweeps within the reach of the criminal sanction conduct which no one dreams of pur-

suing as criminal. Would anyone wish to characterize as criminal the filing of a return on May 15 instead of April 15 accompanied by a full payment of the tax due? Would anyone want to characterize as criminal the failure to pay a quarterly estimate as scheduled although the tax is paid in full on April 15? The statute so construed thus creates thousands of individual crimes which it trusts the good sense and good will of the Commissioner or the prosecutor not to prosecute and a distinguished federal judge has candidly recognized that this is precisely the way the statute operates in fact. *United States* v. *Platt*, 435 F. 2d 789 at 794 (2nd Cir. 1970). The reliance on official discretion to this extent to give parameters to crime seems to us to be deeply incompatible with the Anglo-American legal tradition. Indeed, it is likely to produce that random and eccentric incidence of punishment in an extreme minority of cases which the Court recently found so disturbing a characteristic of the death penalty. For a professional man, such use of the criminal provisions of the tax law can indeed be the death penalty.

## CONCLUSION.

We respectfully urge the Court to entertain the defendant's petition for certiorari so that it may scrutinize and construe this key provision in the pervasively important federal income tax statute.

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# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-152

WILLIAM R. MING, JR., PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) has not yet been officially reported.

## JURISDICTION

The judgment of the court of appeals was entered on May 26, 1972, and a petition for rehearing was denied on June 26, 1972. (Pet. App. 1a, 17a.) The petition for a writ of certiorari was filed on July 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury concerning the element of willfulness in 26 U.S.C. 7203.

2. Whether petitioner was denied a fair trial by reason of the introduction in evidence of an Internal Revenue Service certificate of assessments and payments.

3. Whether the trial court erred in limiting petitioner to three peremptory challenges.

4. Whether petitioner was denied due process by reason of certain rulings, instructions, and comments of the trial judge, or by a question asked by the prosecutor.

5. Whether the trial judge abused his discretion in denying petitioner's pretrial motion requesting that the judge recuse himself on the ground of bias and prejudice.

## STATUTES INVOLVED

Sections 7201 and 7203 of the Internal Revenue Code of 1954 (26 U.S.C.) and Rule 24(b) of the Federal Rules of Criminal Procedure are printed in the Appendix, *infra*, pp. 13-14.

## STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on all counts of a four-count information charging that he willfully failed to file timely federal income tax returns for the years 1963, 1964, 1965, and 1966, in violation of Section 7203 of the Internal Revenue Code of 1954. He was sentenced to consecutive

four-month terms and to $1,250 fines on each of the four counts. It is undisputed that petitioner, a lawyer, failed to file returns for those years when they were due and that his gross income required him to file returns. Petitioner's evidence was directed to whether his failure to file was willful, within the meaning of Section 7203. (Pet. App. 1a-3a.)

Petitioner conceded that when each return here involved was due, he was aware that it was due, yet failed to file it (R. 168).[1] The returns here involved were not filed until October 1967 (R. 48-49). Petitioner had explained to a revenue agent that he was too busy to file returns (R. 47-49).

The trial court instructed the jury that the essential elements of a violation of Section 7203 are (1) that the defendant be a person who is required by law to make a return, (2) that the defendant failed to make a return at the time required by law, and (3) that such failure must be found to have been willful (R. 252). The court instructed that when used in Section 7203, "the word 'willful' means 'voluntary, purposeful, deliberate and intentional as distinguished from accidental, inadvertent or negligent' " (R. 253-254). The court stated further (R. 254):

> I charge you that the only bad purpose necessary for the government to prove in this case is the deliberate intention not to file returns which the defendant knew he was required to file at the time he was required to file them.

---

[1] "R." refers to the record appendix filed in the court of appeals.

ARGUMENT

1. Petitioner contends (Pet. 12-20) that the courts below erred in their interpretation of the word, "willfully," as used in Section 7203 of the Internal Revenue Code of 1954, Appendix, *infra*, which makes it a misdemeanor if any person, *inter alia*, "willfully fails to * * * make such return * * * at the time or times required by law or regulations." Petitioner urges that Section 7203 should be limited to those who "have a criminal intent when they fail to comply with the tax laws" (Pet. 13), and defines such intent as the same intent as in the case of a defendant charged with the felony of willfully attempting to evade a tax, proscribed by Section 7201 of the Code (Pet. 15).[2]

(a) The jury was correctly instructed on the meaning of willfulness in Section 7203, *viz.*, that it means "voluntary, purposeful, deliberate and intentional as distinguished from accidental, inadvertent or negligent" (R. 253-254), and that the only bad purpose required for conviction is "the deliberate intention not to file returns which the defendant knew he was required to file at the time he was required to file them" (R. 254). This instruction is completely in accord with the views of this Court (see *Spies* v. *United States*, 317 U.S. 492, and *Sansone* v. *United States*, 380 U.S. 343) and is not in conflict with *United States* v. *Mur-*

[2] The *amici* brief simply asserts (Br. 5-6) that there is confusion and conflict among the circuits (an essentially mistaken impression, as we shall show), without suggesting any more proper understanding of the willfulness element.

*dock,* 290 U.S. 389, as petitioner contends (Pet. 13-15).[3]

In *Spies* v. *United States, supra,* this Court stated that a deliberate failure to file a timely return constitutes a violation of Section 7203, regardless of whether any tax is due. And in *Sansone* v. *United States, supra,* this Court recognized (380 U.S. at 354) that "an intent to report and pay the tax in the future does not vitiate" the willfulness requirement of Section 7203. These opinions clearly indicate the error of petitioner's contention (Pet. 15) that willfulness within the meaning of Section 7203 necessarily involves an intent to evade the payment of tax.[4]

In *Spies,* this Court explained why a criminal sanction is needed to enforce the timely filing of tax returns, whether or not a tax is owed, stating (317 U.S. at 495-496):

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[3] In *United States* v. *Murdock, supra,* the petitioner was prosecuted for willfully failing to supply information to a revenue agent. He had declined to do so, invoking the privilege against self-incrimination. This court held that there was no offense if the petitioner believed in good faith that, in view of the constitutional privilege, he had the right to refuse to supply the information. Obviously, the present case is entirely distinguishable, since petitioner has never asserted that he believed that he had a right not to file his income tax returns on time and the jury was instructed that there must be a "deliberate intention not to file returns which the defendant *knew* he was required to file * * *" (R. 254, emphasis added).

[4] In *United States* v. *Platt,* 435 F. 2d 789, 793-795 (C.A. 2), involving instructions similar to those given in the present case, Judge Friendly's opinion for the court succinctly demonstrated the correctness of such instructions in light of *Spies* and *Sansone.*

> The failure in a duty to make a timely return, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, is punishable by an addition to the tax of 5 to 25 per cent thereof, depending on the duration of the default. § 291 of the Revenue Act of 1936 and of the Internal Revenue Code. But a duty may exist even when there is no tax liability to serve as a base for application of a percentage delinquency penalty; the default may relate to matters not identifiable with tax for a particular period; and the offense may be more grievous than a case for civil penalty. Hence the willful failure to make a return, keep records, or supply information when required, is made a misdemeanor, without regard to existence of a tax liability. § 145 (a). Punctuality is important to the fiscal system, and these are sanctions to assure punctual as well as faithful performance of these duties.[5]

Petitioner is mistaken in suggesting (Pet. 15-17) that *Sansone* supports his criticism of the jury instruction here involved. The portion of the *Sansone* opinion which petitioner quotes (Pet. 15-16) demonstrates merely that, on the facts of a particular case, there may be a violation of both Sections 7201 and 7203, with no differentiating fact to be found by the jury (and hence no need for a lesser included offense instruction). That

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[5] In making a specified amount of gross income the touchstone of the requirement that a return be filed (see Section 6012(a)(1) of the Code), Congress obviously intended to supply the revenue authorities with timely information from which they, rather than solely the taxpayer, could ascertain whether a tax liability exists.

was so in *Sansone,* since the charge was that the petitioner had intentionally omitted certain income from his return which he knew he should have included.[6] It does not follow that every violation of Section 7203 will also be a violation of Section 7201, or that there must always be an intent to evade a tax for a violation of Section 7203. As already shown, where the offense is a failure to file a return at the time required by law, there need be no intent to evade tax, because the offense is committed even though no tax is due.

(b) Petitioner (Pet. 17) and the *amici curiae* (Br. 6) assert the existence of a conflict among the courts of appeals, citing *Haner* v. *United States,* 315 F. 2d 792 (C.A. 5), and *United States* v. *Vitiello,* 363 F. 2d 240 (C.A. 3). Those opinions, however, do not indicate that either the Third or the Fifth Circuit would, on the facts of this case, have reached a conclusion different from that of the court below. In both cases, the reversals were based on the belief that the jury instructions (permitting conviction on a finding of "careless disregard" of a legal duty) permitted conviction merely on a finding of a careless or negligent failure to file returns. Here, in contrast, the jury was explicitly instructed that "willful" does not mean "accidental, inadvertent or negligent" (R. 253-254).

Petitioner and the *amici curiae* also refer (Pet. 17; Br. 6) to cases in the Ninth Circuit. The only difference suggested by the Ninth Circuit cases, however, lies in

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[6] By so doing, the petitioner had willfully failed to pay his taxes at the time required by law, in violation of Section 7203 (380 U.S. at 345), but the same facts also showed a willful attempt to evade tax in violation of Section 7201.

the fact that the Ninth Circuit sanctions a form of instruction which is less favorable to a taxpayer charged with a failure to file a timely return. See *United States* v. *Fahey*, 411 F. 2d 1213, 1214, certiorari denied, 396 U.S. 957, where the Ninth Circuit reaffirmed its approval of instructions defining "willfully" as "without grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act." As the Ninth Circuit noted (411 F. 2d at 1214), this type of instruction was rejected by the Fifth and Third Circuits in *Haner* and *Vitiello, supra.* It was also, in effect, rejected in the instant case, as we have shown. Obviously, petitioner has no basis for seeking further review, merely because he received more favorable jury instructions than he might have if he had been prosecuted within the Ninth Circuit.[7]

2. Petitioner misinterprets the evidence at the trial in contending (Pet. 20-26) that he was prejudiced by the introduction of a certificate (Pet. App. 18a) concerning his tax assessments and payments. The jury could not have been led to believe from that certificate that petitioner had never filed the returns—as he concededly did, albeit untimely. The Revenue Service employee who prepared the certificate explained in her testimony that she had searched only for records of returns filed on time (R. 57-69). Similarly, the prosecutor in his closing statement argued merely that petitioner had consist-

[7] Thus this case need not be held for disposition of *United States* v. *Bishop*, No. 71-1698, in which the government seeks to challenge the Ninth Circuit rule in the context of a lesser-included offense instruction.

ently failed to file his returns when they were due (R. 223).

3. Petitioner asserts (Pet. 26-29) that he was prejudiced because the trial court permitted each side only three peremptory challenges to the jury. He contends that Rule 24(b) of the Federal Rules of Criminal Procedure (App. *infra,* p. 14) should be interpreted to require allowance of a larger number. Reasonably interpreted, however, Rule 24(b) simply distinguishes between felonies and misdemeanors, granting the defendant ten peremptory challenges in a felony trial and three in a trial for a misdemeanor. Petitioner cites no authority for his view (Pet. 27) that a trial on several misdemeanor counts creates a right to exercise more peremptory challenges. Contrary to petitioner's contention is *Nestlerode* v. *United States,* 122 F. 2d 56, 58-59 (C.A. D.C.).

4. Petitioner cites a number of alleged trial errors (Pet. 29-33) in support of the broad assertion that he suffered "a general denial of due process of law" (Pet. 29). The criticisms are without merit.

(a) Both the petitioner (Pet. 31) and the *amici curiae* (Br. 6-8) complain of the fact that the trial court admitted "evidence of previous failure to file timely returns" (Pet. 31), but excluded evidence proffered by petitioner to show that he paid his taxes before the initiation of prosecution. The *amici curiae* contend that these rulings are inconsistent and reveal "inconsistent constructions" of Section 7203 by the courts below (Br. 7-8).

Both rulings were correct. Evidence that petitioner

ultimately and belatedly paid his taxes might be relevant if an intention to evade tax were an element of the misdemeanor here involved, but, as we have shown, that clearly is not the case.[8] On the other hand, the evidence of a past history of belated filing of returns was properly admitted (R. 62, 64), as showing a "pattern of conduct" (R. 62). This evidence, although hardly essential to the government's case, had a tendency to show that the late filing of the returns specified in the indictment was not "accidental, inadvertent or negligent" (R. 254). Its admission did not depend upon adoption of petitioner's theory (Pet. 15) that Section 7203 requires an intent to evade the payment of taxes.

(b) Petitioner complains (Pet. 29-30) of the fact that when he was interviewed by revenue agents at his own law office in November 1967, he was not advised of his constitutional rights and was not so advised until some later date. Suffice it to say that this case, involving a lawyer, is hardly a suitable vehicle for reviewing the question whether *Miranda* v. *Arizona,* 384 U.S. 436, should be extended to noncustodial interviews by revenue agents. This Court has frequently declined to review that proposition. See, *e.g., United States* v. *White,*

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[8] The particular point of dispute at the trial involved an effort by the defense to introduce in evidence five checks showing payments by petitioner to the Internal Revenue Service (R. 159). The court excluded the checks, observing that "the fact of payment is not an issue" (R. 162). Evidence had already been admitted, showing that petitioner's returns for 1964, 1965, and 1966 were filed on October 11, 1967 (R. 42-43). There had also been evidence of the late filing of other returns (R. 76). There was evidence that petitioner had come under tax investigation and that revenue agents had communicated with him before he filed the various returns in question (R. 42, 74).

417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Miriani,* 422 F.2d 150, 153-154 (C.A. 6), certiorari denied, 399 U.S. 910; *United States* v. *Prudden,* 424 F.2d 1021 (C.A. 5), certiorari denied, 400 U.S. 831; *United States* v. *MacLeod,* 436 F. 2d 947 (C.A. 8), certiorari denied, 402 U.S. 907. Similarly, this case is not a suitable one for considering the impact of the Internal Revenue Service regulation (Pet. 29-30), adopted only a few weeks before petitioner was interviewed, requiring that certain warnings should be given "If the potential criminal aspects * * * are not resolved by preliminary inquiries."

(c) Petitioner's remaining criticisms (Pet. 31-33) concerning alleged prejudice and trial error were sufficiently considered and properly rejected by the court of appeals (Pet. App. 7a-11a).[9]

5. The court of appeals did not err in rejecting (Pet. App. 4a-5a) the contention (Pet. 33-35) that Judge Hoffman was obliged to recuse himself because of petitioner's motion and affidavit requesting that he do so. To be sufficient, such an affidavit must give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States,* 255 U.S. 22, 33-34; *Rosen* v. *Sugarman,* 357 F. 2d 794, 797-798 (C.A. 2). Here, the affidavit (Pet. App.

[9] For example, "partisan political implications" (Pet. 32) were supposedly shown by a single question asked by the prosecutor, as to whether petitioner had voted in the "Democratic Primary Election in April of 1964" (R. 172). The purpose of the question was to show that petitioner was not too busy to vote (R. 171). Petitioner had previously volunteered information which at least suggested his party affiliation (R. 141), and his counsel made no objection when the question now under challenge was asked (R. 172).

45a-49a) contained no allegations of any substance and was self-defeating, since petitioner also stated that he "has known Judge Julius J. Hoffman for many years and has a high regard for him" and "believes the high personal regard to be mutual" (Pet. App. 48a).

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
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*Assistant Attorney General.*

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SEPTEMBER 1972.

## APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

### SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

### SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or

imprisoned not more than 1 year, or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure:

Rule 24. TRIAL JURORS

* * * * *

(b) *Peremptory Challenges.* If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

* * * * *

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

## No. 72-152

WILLIAM R. MING, JR.,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner tenders this petition for rehearing following an order on October 16, 1972, denying a petition for certiorari.

In accordance with Rule 58 of the Rules of this Court, petitioner asserts that there are intervening circumstances of substantial, and perhaps controlling, effect. Those circumstances are the statements of the Solicitor General in support of his petition for certiorari in *United States* v. *Bishop*, 71-1698, and the grant of a writ of certiorari by this Court in that case on October 10, 1972.

Petitioner in the instant case did not have access to the statements of the Solicitor General in the *Bishop* case until after the petition for certiorari had been denied in the instant case.

The major issue in the instant case, as petitioner endeavored to demonstrate in his petition for certiorari, is the meaning to be given the term "willfully" in §7203 of the Internal Revenue Code. Petitioner has contended that this statutory word of art, see *Screws* v. *United States*, 325 U.S. 91, 101-102, 65 S. Ct. 1031, 1035-1036 (1945) and cases there cited, should be given the same meaning whenever it is used in federal criminal legislation, and particularly should be given the same meaning when used in different sections of the Internal Revenue Code. In addition, petitioner contended that there was a conflict among the courts of appeal of the various circuits as to the meaning of the term "willfully" and urged this Court to resolve that conflict.

Perhaps inadvertently the Solicitor General misconstrued the argument of petitioner and, in effect, urged that petitioner failed to distinguish between the elements of the offenses prohibited in §§7201 and 7203 of the Internal Revenue Code (*Ming*, Brief in Opposition, pg. 5). Nothing in the record in this case nor in the briefs warrants that argument. §7201 provides that it is a felony if any person "willfully attempts in any manner to evade or defeat any tax, etc."[1] Thus in §7201 the proscribed conduct is the "at-

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[1] §7201. *Attempt to evade or defeat tax*

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851."

tempt in any manner to evade or defeat any tax." That section makes it clear that this is not a part of the definition of the term "willfully" as used in §7201. Rather, it is a definition of the crime itself.

When §§7201, 7203, 7206 and 7207 of the Internal Revenue Code are compared, it is thus apparent that the term "willfully" has been used by Congress in each of them without any definition of the term. Significantly, it is used four times in §7203.

The Solicitor General in *United States* v. *Bishop* now argues that the term "willfully" in §§7206 and 7207 should be given the same meaning, i.e., that the Ninth Circuit was wrong in concluding that there could be a "lesser included offense" in that case. Thus the Solicitor General in *Bishop* takes precisely the position which petitioner took in the instant case and which the Solicitor General resisted. Similarly, in the *Bishop* case the Solicitor General, in effect, concedes the existence of a conflict in the several circuits with respect to the meaning to be given to the term "willfully" in the Internal Revenue Code. Ironically, to show the conflict he cites the very cases relied upon by the petitioner and the *amici*.

In the instant case the Solicitor General urged that petitioner failed to show that the rule of the Ninth Circuit would have produced a different result in petitioner's case (*Ming*, Brief in Opposition, pg. 8). We respectfully submit that under the Rules of this Court that is of no moment. It is the existence of the conflict in the decisions which is the important thing and this now appears to be conceded in the *Bishop* case. It would appear to be a fair inference that this had some effect on the decision of this Court to grant the petition for certiorari in the *Bishop* case.

Petitioner recognizes that he may not properly, in a petition for rehearing, reargue the application for certiorari. In light of the foregoing matters, however, petitioner respectfully directs the attention of the Court again to the petition for certiorari in the instant case. This, particularly because the Solicitor General in the instant case urged that the petition for certiorari could be acted upon without waiting for disposition of *United States* v. *Bishop* when he knew, or ought to have known, that there was this similarity and inconsistency in his legal positions with respect to the instant case and the *Bishop* case (*Ming,* Brief in Opposition, pg. 8).

Petitioner would remind the Court that the Solicitor General and the court below in the instant case relied on the fact that the District Court instructed the jury that the term "willfully" in §7203 did not mean "accidental, inadvertent, or negligent." This negative interpretation does not justify a failure to require a showing beyond a reasonable doubt of criminal intent on the part of petitioner. This is particularly significant where, as here, what is involved is a failure to provide a construction of "willfully" sufficiently rigorous to assure that there may not be a conviction for violation of §7203 simply because there is a dispute between the government tax authorities and the defendant as to the propriety of the priorities on which his conduct was based, rather than the question as to whether his conduct was criminally motivated.

We respectfully submit that failure to give a uniform meaning to the term "willfully" permits, and indeed encourages, differences in the criminal intent required to be shown in a tax case from case to case. This kind of law enforcement would not appear to satisfy traditional con-

stitutional requirements of due process and equal protection of the laws.

For all of the foregoing reasons we respectfully urge the Court to reconsider and rehear the petition for certiorari and to grant the petition.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

/s/ Sophia H. Hall
Counsel for Petitioner